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THE DOMINIONS AND THEIR MOTHER COUNTRY.

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Part II.

HAVING completed our review of the historical relations, we are now in a position to inquire how nearly the self-governing Dominions have already approached in actual fact to their theoretical equality with the mother-country. I prefer, for distinctness sake to add the epithet " Self-governing " ; for they form only a part of the King's " Dominions " in the wide older sense of that word. The Imperial Conference of 1907 introduced a new and narrower sense, in which it is now limited to such Dominions as have Responsible Government. (Canada in 1867 desired to be called a " Kingdom," but it was feared that the United States would resent it.)

Let me now attempt to summarise the present, and to offer some hesitating conjectures about the future, of the Self-governing Dominions; whose present enhanced status was so vividly recognised last June by the creation of a separate Secretaryship of State " for Dominion affairs," with a Parliamentary, and also a permanent, Under-Secretary of its own.

The inquiry into their Present involves two questions. To what position have the seven Dominions now attained (1) as regards nations outside the Empire and (2) as regards Great Britain and their other co-partners inside the Empire? In other words, how do they stand in International Law and in Constitutional Law?

I.—I begin with International Law, because the position in it is the less obscure though it is not altogether clear, and probably not yet fully

on business in London, must have intended that their rights should be governed by English law, because it was not likely that brokers in London would apply any other law; and, accordingly, it was held that, in that particular case, English law governed the contract, although it was to be performed in Scotland.

Parties are seldom careful to express their intentions; and so provision has to be made for the cases where the parties fail to express any intention upon the point. In those cases, the law which governs the contract is still to be determined by the intention of the parties; but, instead of finding it quickly and easily, you have to consider a great many matters to find out what that intention was. I think the best way of formulating the rule is as follows: Where there is a contract with a foreign element in it, and the parties have not expressed their intention as to the law which is to govern the contract, one must consider all the circumstances of the case; the nature of the contract; the language and terms in which it is expressed; the place where it was made; the place where it is to be performed; and all the other facts of the case, for the purpose of finding out, with more or less probability, what was the intention of the parties upon the determining question, by the law of which country is this contract to be governed.

How Proper Law of Contract to be Ascertained.

There are several matters which afford a good deal of help upon this point. For instance, if a contract is made between an Englishman and a foreigner with regard to an immovable, and the parties have not expressed any intention upon the point, the presumption is that they intended the law of that country where the immovable is situate to govern the contract. Here you apply the general rule first mentioned; that in all matters affecting an immovable property, the governing law is to be found in the *lex situs*. Again take the case of maritime contracts: contracts of affreightment, bills of lading, charter parties, bottomry bonds—and other contracts which are entered into by the master of a ship. Here you may get a vastly complicated state of facts. One of the leading cases is *Lloyd* v. *Guibert*, L.R.1, Q.B.115, where a British subject chartered a French ship, belonging to French owners, at a Danish West Indian port, for a voyage from a port in Hayti to Havre, London or Liverpool at charterer's option. On the voyage the ship was damaged, and had to put in for repairs to Fayal, a Portuguese port, where a bottomry bond was given by the master. Now, you see all the elements of a beautiful complication. The ship was French; the charterer was English; the voyage commenced in Hayti; the place where the bottomry bond was given was in Portugal; the destination of the ship was either France or England, as the charterer might direct. After a great deal of

Maritime Contracts.

discussion, a rule was laid down which, in the absence of any expression of a contrary intention, governs all contracts entered into by the master of a ship, and that is "The Law of the Flag." If the master of a ship signs a bill of lading, or a charter party, or a bottomry bond, or any similar contract, it is the law of his flag which is the governing law of that contract.

LAW OF THE FLAG.

In the absence of any special circumstance, there are two matters which are always of great importance to be attended to in finding out which law is to govern the contract. One is the place where the contract was made (*lex loci contractus*); the other is the place where it is to be performed (*lex loci solutionis*). The old tendency of English authorities was strongly in favour of the *place where the contract was made;* not, I think, a very satisfactory test, because, obviously, in many cases it is accidental. But the current of later authority has set in favour of the *place where the contract is to be performed*, as being more likely to be in the minds of the contracting parties, when they make their contract, as the place whose law is to govern the contract.

LEX LOCI CONTRACTUS.

LEX LOCI SOLUTIONIS.

It may happen (which introduces a further complication) that part of the contract may be governed by one law, and part by another; but still, for general purposes, the rule to bear in mind is, that when you do not find an express declaration of intention on the point, you have to look at all the facts as above pointed out, and then make up your mind as to which law was probably intended by the parties to be that which should govern their rights under that contract.

This governing law, when ascertained, is commonly called *the proper law of the contract.*

I propose now to state different points which may arise with reference to a contract; and to point out what is the rule as to the territorial law which governs each point.

As to formation of contract—the first point is as to the *form of the contract*; whether the contract, in order to be valid, must be in writing; whether it must be under seal; if it is made abroad, whether it had to be made in the presence of a notary. The form of the contract is *not* governed by the proper law of the contract; but by the law of the place where the contract is made. If a contract is made in England, which English law requires to be under seal, the contract, to be valid, must be under seal. If made in Scotland, the same contract would probably *not* be required to be under seal, but only to be in writing; and if made in Scotland, in writing, without a seal, it will be good in England, although English law would require some further

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LEX LOCI CONTRACTUS.

solemnity. On the other hand, if the contract is made in France, it may happen that it would require the attestation of a notary, and a great deal of form, which would not be required in England; but English law would require, for the validity of that contract in respect of *form*, that it should be made in accordance with French form, and not in accordance with English form. In short, the general rule of English law is, *locus regit actum*, the law of the place where a transaction is entered into governs the *form* by which that transaction is to be made binding. There are some exceptions to this general rule. Thus, a contract dealing with a thing immovable must be in such form as is required by the law of the place where the immovable is situate; and, probably, it must also be in such form as is required by the law of the place where it is made; so, in that case, you have to comply with the law of both places.

LOCUS REGIT ACTUM.

Before leaving this topic, I ought to utter a warning against one pitfall, namely, that you must be careful to distinguish between "form," and mere "evidence." For instance, take our English Statute of Frauds. That required, with regard to many contracts, that the contract should be in writing, or should be evidenced by a memorandum in writing. That is not a "form," within the meaning of the rule with which we are now dealing. It is mere matter of evidence; the writing may be made weeks or months after the contract. So that statutory requirements of that kind do not affect the "form" of the conrtact, but only the "evidence" of it. Now, as to matters which are merely *evidentiary*, the governing law is not the law of the place where the contract was made (*lex loci contractus*), but the law of the place where it is litigated (*lex fori*). As I shall presently show, with regard to all matters of procedure, the law of the Court in which the action is brought (*lex fori*) governs in every respect. I merely mention this qualification as to the "evidence" of a contract, in order to prevent any confusion between the "form" of a contract, and that which is merely "evidence" of the contract.

LEX FORI.

The next matter affecting formation of contract which is important to be mentioned is the *capacity* of the parties to make the contract. Thus, in English law, majority is fixed at the age of 21. In other countries, the age is sometimes higher. For instance, in Prussia, I think it is 24 or 25. If a Prussian, of the age of 22, enters into a contract here, and being sued upon it, pleads by way of defence that he is a domiciled Prussian, and, according to Prussian law, was a minor at the time when he entered into the contract, and incapable of binding himself, the English Judge, before he could give judgment for the plaintiff or for the defendant, would have to determine whether, for

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the purposes of that contract, the capacity of that Prussian defendant should be governed by English law, in which case he *would* have capacity, or by Prussian law, in which case he would *not* have capacity. In a very celebrated case before the Court of Appeal, of *Sottomayer* v. *De Barros* (3 P.D.1.), there are very sweeping statements to the effect that, in every case, the capacity of a party to contract is to be governed by the law of his domicil. The case in which the law was so laid down, was a case of marriage; it was as to the validity of a marriage between two Portuguese, being first cousins; and first cousins by Portuguese law are prohibited from inter-marrying. As applied to a contract of marriage, or other contract affecting *personal status*, no doubt, those statements are right; but as to other contracts, say, an ordinary mercantile contract, I doubt the law being as laid down in Sottomayer. In the case put of a domiciled Prussian, 22 years of age, coming over to England, retaining his Prussian domicil, and, whilst here, entering into contracts for the purchase of jewellery, or other things which cannot be considered as necessaries, and then relying on his Prussian infancy as a defence to an action for the price, I do not think that the ultimate Court of Appeal will hold that defence good to evade payment of his English debts. Although I admit that the existing dicta in the authorities are contrary to the view which I propound, I think ultimately the law will be settled, that, in the case of *ordinary mercantile contracts*, the contractural capacity of a party is governed by *the proper law of the contract;* that proper law being ascertained in the way already mentioned. Now, in the case put of a Prussian infant, who would be an adult if English, walking into a shop in London and contracting a debt for goods supplied, obviously the proper law of the contract is English. The English tradesman knows nothing of the nationality or the domicil of the purchaser; and he has no other intent in making that sale than to make an English contract; and, in my view, it will ultimately be held that, in such a case as that, it is *the proper law of the contract* that governs the capacity.

Again, with regard to *immovables*, there is authority for saying that the capacity of the owner of an immovable property to enter into a contract to sell it, is to be governed not by the law of his domicil, but by the law of the country where the immovable is situate. But when it is a contract which affects a person's *status* (and the most obvious contract of that description is the marriage contract), then it is law that the capacity of the parties to make that contract is to be governed by the law of their respective domicils.

Next, as to the *essential validity* of a contract. It may happen that a contract which is valid according to the law of one country is invalid according to the law of another country. For instance, in the great case of *Santos* v. *Illidge*

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(8 C.B.N.S. 861), parties in Brazil, at a time when slavery was a legal institution in Brazil, entered into a contract there for the sale of slaves. The contract was made in Brazil; to be performed in Brazil; and the purchase money was to be paid in Brazil. According to the law of Brazil, the contract was valid. It was not carried out; and one party sued the other on that contract in our Court of Common Bench. Such a contract as that, if governed by English law, was obviously invalid. It was, therefore, the subject of a great argument: "Can such a contract as this be sued upon in an English Court? Whatever may be its fate in Brazil, is it not invalid in England?" That question was solved by considering what was *the proper law of the contract.* Now it was clear that the proper law of the contract was Brazilian law, by which law, the contract was valid; and it was held that *the validity of a contract is to be governed* (subject to one or two qualifications which I will mention directly) *by the proper law of the contract;* and, inasmuch as this particular contract was valid according to the law of Brazil, which was its proper law, it might be sued upon, and should be treated as valid, in England; although, had English law been the proper law of the contract, it would have been invalid.

But there are two exceptions to the rule. The first exception is this: Although a contract is valid according to its proper law, yet, if it is unlawful according to the law of the place where it is to be performed, then it is unlawful for all purposes.

Again, if a contract which is governed by foreign law is sued on in an English Court, and the object of the contract is to do something which is contrary to English notions of morality, or to English public policy, an English Court will not entertain that action.

But, subject to those exceptions, the general rule is, that the validity of a contract depends upon that which is determined, in the way I have mentioned, to be its proper law.

Next, assume that we have got a contract made in due form (*i.e.*, according to the law of the place where it was made); which is valid according to the proper law of the contract; and the parties had due capacity to contract; there still remains to *interpret* that contract; and to find out what is its effect upon the parties; in other words, what is the *extent of the obligation which it imposes.* For that purpose, without any exception, so far as I am aware, the governing law is *the proper law of the contract.* Its proper law governs the interpretation, the effect, and all the incidents of the contract; not merely everything which is expressed in the contract, but everything which is to be implied from it. In short, for the purpose of finding out what is the *whole extent*

INTERPRETATION.

of the liability of each party to a contract, you must regard the *proper law of the contract.*

The above points arise in connection with the formation and interpretation of a contract; but there remain to be considered questions with regard to the *performance* of contracts, and the *discharge of obligations* thereunder otherwise than by performance; for instance, by the unpleasant process of becoming a bankrupt.

PERFORMANCE OF CONTRACT.

With regard to the *performance* of a contract, and I think all matters relating to *discharge*, the governing law is the *proper law of the contract.* If the question is whether a contract has been *duly performed*, the law to be applied is the proper law of the contract. That, of course, is involved in the rule that the proper law governs in all matters connected with the obligation and effect of the contract. But there are *other modes of discharge* besides performance; for instance, discharge under a bankruptcy. With regard to such matters, the rule is the same. The discharge, to be a good discharge, must be so in accordance with the proper law of the contract; unless, indeed, you find an Act of Parliament, or a binding law, to the contrary, in the country in which the question has to be judicially determined. You will readily follow me when I say, that private international law, being Judge-made law, gives way to an over-riding enactment in an Act of Parliament binding the Court before which the question arises. Subject to that, the discharge must be in accordance with *the proper law of the contract;* and, therefore, when a man entered into an English contract, as to which there was no question that English law was the proper law of the contract, and then went to America, and there became bankrupt, and got a discharge; it was held by the Court of King's Bench, that a discharge under a bankruptcy in the State of Maryland was no answer to an action in England on that English contract. You must have a discharge which is good by the proper law of the contract (*Smith* v. *Buchanan*, 1 East 6).

DISCHARGE OF CONTRACT.

DEFENCE OF STATUTE OF LIMITATION.

I think, perhaps, it would be well here to draw a distinction with regard to Statutes of Limitation. Of course, periods of limitation vary in different countries; and if a man be sued in England on a contract, the proper law of which is (say) French law, and the French Statute of Limitation is three years, but the English Statute of Limitation is six years, the question may arise which Statute of Limitation is to be applied—the Statute of the country whose law is the proper law of the contract, or the Statute of the country where the action is brought? Now, here a distinction may have to be made. In our

legislation, Statutes of Limitation with regard to obligations do not destroy the right or discharge the liability; but merely bar the remedy. But in some foreign countries, the Statute of Limitation does not merely affect the remedy; it destroys the right and discharges the liability. If there is a Statute of Limitation in the country whose law is the proper law of the contract, which *destroys the right and discharges the liability* under the contract at the end of the prescribed period, that is a good discharge in this country. That is in accordance with the general rule; it is a discharge by the proper law of the contract. But if the Statute of Limitation of the country whose law governs the contract, does *not discharge the liability*, but merely *bars the remedy*, and the action is brought in another country, which has a different period of limitation, then the Statute of Limitation which applies is not the Statute of the former country, but is the Statute of the country where the action is brought; because such a Statute is considered to be a mere matter of remedy, and comes within the general rule already mentioned, that in all matters connected with procedure and remedy, the governing law is the law of the country in which the action is brought, the *lex fori*.

LEX FORI.

The subject of obligations *ex contractu* is one, to deal fully with which would occupy much space; but I fear I must now pass on to the second division of obligations; that is to say, "Obligations Arising from Torts," or wrongs independent of contract. Here there is a clear rule, but it is just a little complicated. With one exception, an action may be brought in the English Courts in respect of a wrong committed abroad. For instance, the case of *Mostyn* v. *Fabrigas*, before Lord Mansfield, which was an action against the Governor of one of our Dependencies, by a man who said he had been falsely imprisoned there; and a similar action was brought against Governor Eyre, the Governor of Jamaica, some fifty years ago. In those cases, the action was brought in England; and (subject to the exception to be presently mentioned), an action for a wrong committed in a foreign country will well lie in England under two conditions, which may be stated as follows: First, the act must be *wrongful* in the country where it was done; because, if an act done in a foreign country is not wrongful there, it stands to reason that the person who does that lawful act, say, in Italy—if he afterwards happens to come over to England, cannot be made liable here as for a wrongful act. Therefore, in order that an act done abroad may be actionable here, it must be wrongful according to the law of the foreign country where it was done (*lex loci delicti commissi*).

OBLIGATIONS EX DELICTO.

LEX LOCI DELICTI COMMISSI.

But, although the act must be *wrongful* in the country where it was done, it need not be civilly *actionable* there. Therefore, where the defendant had committed an assault upon the plaintiff, in a place where there was no civil remedy in damages for an assault, but merely a criminal process, and afterwards came to England; and the person assaulted followed him, and brought an action for damages against him; it was held (*Machado* v. *Fontes*, [1897] 2 Q.B. 231) that the defendant was liable to make compensation in damages; because all that is necessary for the purposes of the rule is, that the act should be *wrongful* in the foreign country; it need not be *actionable as a civil wrong*. That pertains to remedy.

LEX FORI.

The second condition required, in order that a wrongful act done in a foreign country may be actionable here, is that the act be such as is *wrongful and actionable according to English Law* (*lex fori*).

TRESPASS TO FOREIGN LAND.

I stated above that there is an exception, in which an action can *not* be brought in England in respect of a wrong committed abroad, although it appears to fall within the two conditions above stated. It is the case of a trespass or other tort to an immovable situate in a foreign country. For such a tort, no action can be maintained in an English Court.

I have now traversed, in a brief and necessarily imperfect sketch, the rules of our subject matter (Choice of Law and Private International Law) relating to rights of property, both in things immovable and things movable, and to obligations, both those arising from breach of contract and those arising from torts.

I propose now to state the rules which come into effect upon the happening of three very important events, namely, marriage, death, and bankruptcy. But before I can do that, I must analyse a notion which is not of leading importance in connection with questions of property and obligations, but which becomes of governing importance with regard to the three events above mentioned, and that is the notion of *domicil*.

DOMICIL.

Domicil is a matter that has never been defined to the satisfaction of any English Judge. I do not pretend to have an original definition of it, but I have combined certain well-known judicial definitions. Domicil is a man's permanent home; it is the place in which a man has a habitation, without any present intention of removing therefrom. That definition will show you that domicil is a good deal more than mere residence. It involves a notion of permanence; and a domicil once acquired may remain, although the place of residence is changed. A man who has an English domicil, but whose health compels him to reside in the South of France

for the greater part of the year, does not lose his English domicil by going to France in accordance with his yearly habit.

Everybody has a domicil; and nobody has more than one at a time.

A domicil is either a *domicil of origin;* that is to say, the domicil which a man acquires when he is born; or a *domicil of choice;* that is, the domicil which he acquires by his own voluntary act when he is of full age, and is able to change his domicil.

DOMICIL OF ORIGIN.

A domicil of origin is acquired at birth. If the child is legitimate, and has a father living at his birth, that child's domicil of origin is the domicil of his father at the time of his birth; but if he is illegitimate, or has no father living at his birth, then his domicil of origin is that of his mother at the time of his birth. A domicil of origin never changes; it is always fixed with reference to birth.

DOMICIL OF CHOICE.

A domicil of choice is a domicil which is acquired by actually going to and settling in a place with the intention of remaining there permanently and making it your home. A domicil of choice is acquired in the case of an independent person by two elements, *factum plus animus*. *Factum* is the act of going to the place where you intend to make a permanent home, and taking up your abode there. *Animus* is the *animus ibi manendi;* the intention of remaining permanently in that place and making a home there. Those two things must concur. A domicil may be changed in the case of dependent persons; such as a wife or child; by the acts of the person on whom they are dependent. A wife on marriage acquires the domicil of her husband; and if the husband, during the marriage, changes his domicil, the wife's domicil changes by the same act. So the domicil of a minor, a child under age, will be changed if his father; or (his father being dead), his mother, being a single woman, and having power to acquire a new domicil for herself; should change his or her domicil; thereupon, the domicil of the dependent minor changes at the same time.

A domicil of *origin* is never absolutely lost; it is displaced, if a domicil of choice is acquired; but if that domicil of choice is abandoned, without any new domicil of choice being substituted, the domicil of origin revives. It can not be abandoned.

But a domicil of *choice* may be abandoned and lost, so that you get rid of it; and the way in which you abandon a domicil of choice is by leaving the place with the intention of abandoning it as your home. Just as a domicil of choice is acquired by *factum* and *animus;* so both those elements must concur, in order that you may lose that domicil of choice. There must be the *factum* of actually going away; and the *animus non revertendi*, the intention of *not* returning; and if those two things concur, then, you have abandoned your domicil of choice. But

you do not lose your domicil of choice by one only of them. If you have got a domicil in England, you may go to the South of France every year; but if you have no intention of abandoning your English domicil, it will cling to you, and you do not acquire a French one.

There are a number of technical rules and distinctions connected with domicil; but the main idea with regard to a domicil *of choice* is, that domicil is residence with an element of permanence about it; that to abandon your domicil, you must leave the place with the intention of not coming back to it; and that to acquire a new domicil, you must go to a place with the intention of permanently residing in that place.

When a domicil of *choice* is abandoned, a man may acquire a new domicil by virtue of the same act. If I, being domiciled in England, intend to abandon it and acquire a domicil in France, and leave England with the intention of not coming back, and go to France with the intention of residing there permanently, I at once substitute one domicil for the other. But a man may abandon a domicil of choice without acquiring another; and then his domicil *of origin* revives. Thus, if a Scotchman, whose domicil of origin is Scotch, but who has acquired an English domicil of choice, leaves England intending not to return, but does not return to Scotland; and he is not certain whether he will go to Africa, or Australia, but thinks he will travel for a time; he does not, under those circumstances, acquire a new domicil of choice; because he does not go anywhere to settle, and in truth he has no particular intention of settling anywhere. As soon as he has left England, with the intention of not coming back, he has abandoned his English domicil of choice. Thereupon, his Scottish domicil of origin revives, and clings to him whilst he is travelling about, and until he has acquired a new domicil of choice, by settling somewhere with the intention of remaining there. So that a domicil of origin, though displaced for the time by a domicil of choice, always remains in the background, ready to come forward when there is no existing domicil of choice.

I will now state briefly the rules which regulate the case of *marriage*.

MARRIAGE.

The first matter is, as to the *constitution of the marriage relation*—the making of the contract. As to *capacity*, as I have mentioned already, that is governed by the *law of the domicil* of the respective parties. Marriage is a contract which affects status; and in all matters concerning status, the law of the domicil (the personal law) is all important as to capacity. As to the *form of ceremony*, the place where the act is done governs the form of the act; and, wherever the marriage is celebrated, if it is celebrated in accordance with the form required by the law of that place, it is valid so far as form is concerned. But, under a modern Act of Parliament

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(the Foreign Marriages Act, 1862), a British subject who marries outside the United Kingdom may be married before a British Ambassador or a British Consul; and that marriage is valid, although it be not in accordance with the form required by the law of the place where it is celebrated.

EFFECT ON PROPERTY.

As to the *effect of marriage on property*, so far as regards the *immovable* property of either party, the law of the place where the land is situate governs. As to *movable* property, if there is a marriage contract, that governs the rights of the parties in movable property; and, *prima facie*, *the proper law of a marriage contract* is the law of the *matrimonial domicil;* that is, the place where the married pair mean to reside permanently; which will, in ordinary cases, be the domicil of the husband. But parties may marry without a contract as to their movables. In that case, their rights in their movables are governed by the *law of the matrimonial domicil.*

DIVORCE.

Next, as to *Divorce*, which is the dissolution of the Marriage Contract: —here, again, domicil is all important; *not* the domicil at *the time of the marriage*, but the domicil at the *time of the divorce;* that is, the domicil of the husband, which is that of the married pair. The only Court which has jurisdiction to grant a divorce is the Court of the place where the married pair are domiciled at the time of the proceeding. It is immaterial where they were married, or what was the marriage domicil, or what is the residence of the parties.

LEGITIMACY.

Closely connected with marriage is the question of *legitimacy*. A child born anywhere in lawful wedlock is legitimate; and this is the *only* legitimacy which English law recognises for *succession to English land*. But there is another kind of legitimacy. In accordance with the law of some countries, if the father and mother of an illegitimate child afterwards marry, that subsequent marriage has the effect of legitimatising the child born before; and that, under the following conditions, is recognised by English law for the purpose of succession to *movables*, but *not* for the purpose of succession to *land*. In order that the subsequent legitimation (*legitimatio per subsequens matrimonium*) may take place, the law that the child is capable of being legitimatised by a subsequent marriage must prevail *both* in the place which is the father's domicil at the time of the child's birth, *and also* in the place which is the father's domicil at the time of the marriage. For instance, Scotch law allows legitimation by subsequent marriage; English law does not; Belgian law does. Therefore, if a couple being unmarried have a child in Belgium, where the father is domiciled at the time of the birth; and then the father changes his domicil to England, and there they marry; that child is *not*

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legitimate for any purpose in accordance with English law. On the other hand, if the father's domicil had been changed from Belgium to Scotland, and there the parents had married; the child would become legitimate in English law for every purpose, except that of succeeding to English land; that is to say, the child may succeed, as a lawful child, to the movable (but not the immovable) property of a person whose estate is divided in accordance with English law. The all important matter is the father's domicil (not residence) at the two dates mentioned.

Next, I will mention briefly the rules which regulate the *devolution of property on death.*

DEATH.

IMMOVABLES. As to *immovable* property, it is exclusively the law of the place where the land is situate that governs.

As to *movable* property, the rights of the parties who claim to be interested are, in English law, governed by the law of the *dead man's domicil at the time of his death.* That is the law which decides whether he died testate, or intestate.

PROPERTY.

MOVABLE

If he has died *intestate*, then, in all respects, the succession to his movable property is governed by the *law of his domicil at the time of his death*, without regard to the place where the movable property is situate. I refer to the distinction drawn, when dealing with the law governing movable property, between the law which governs if you are considering a particular or individual piece of property, and that which governs if it is considered as part of a *universitas* or mass devolving on some one event, for instance, the death of the owner.

INTESTACY.

With respect to *testamentary succession to movable property*—as to the *form of the will*, that is governed by the *law of the domicil at the death*, and not by the law of the place where is was made. This is an exception to the general rule *locus regit actum;* which is traceable to the strength of the rule that in all matters as to testacy or intestacy, the law of the domicil *at the death* prevails as to movables. But under Lord Kingsdown's Act, a British subject may also make a will out of the United Kingdom in accordance with the law of the place where he makes his will, or in accordance with the law of his domicil at the time when he makes it.

TESTACY.

FORM OF WILL.

As to the *validity of the will*, and the *capacity of the testator*, that depends on the law of the testator's domicil at the time of his death. So that the *law of the domicil at the death* is all important when it is a question of the devolution of the *movable* property of a dead man.

VALIDITY OF WILL.

As to the *interpretation of the will*, the law of the domicil at the death has *not* the same governing effect. The true matter for consideration is, what law is best calculated to give effect to the testator's intention. If a domiciled Englishman living in France, should make a will in the French language, particularly if he uses technical terms of French law, the construction will, wholly or partly, be governed by French law; because the circumstances mentioned render it more probable that, by applying French law to the construction of the will, the testator's real intention will appear.

INTERPRETATION OF WILL.

BANKRUPTCY. With regard to *bankruptcy*, a distinction must be drawn between an English bankruptcy and a foreign bankruptcy.

As to an *English bankruptcy*, the English Court has jurisdiction where there is an act of bankruptcy in England, although the person who commits it is a foreigner; but a bankruptcy petition can only be presented against a man who is either domiciled in England, or within a year before the petition, has ordinarily resided or had a dwelling house or place of business in England. That, however, is rather English bankruptcy law than private international law.

ENGLISH BANKRUPTCY.

The effect of an *English* bankruptcy on *the bankrupt's property* is, that it passes all the bankrupt's property, both immovable and movable, within the British Dominions, including the Colonies; because the English Bankruptcy Act is an Act of the Imperial Legislature, which governs not merely in England, but in Scotland, in Ireland, and in all the Colonies. Consequently, in all those places, the *bankrupt's property passes;* and, in all those places, a *discharge in the bankruptcy* from the bankrupt's debts and liabilities is a *good one*. So that, although the proper law of a contract should be French law, and although by that law the English bankruptcy should not discharge the liability, yet, *in an English Court*, if the debtor has obtained a discharge under an English bankruptcy, that English discharge is good; not by virtue of any rule of Private International Law, but because the matter is governed by an Act of Parliament binding the English tribunal.

EFFECT ON PROPERTY & LIABILITIES.

The administration in an English bankruptcy of the bankrupt's assets takes place in all respects according to the law of the Court where the bankruptcy is proceeding; that is, English law, the *lex fori*. The assets may be foreign assets; yet if the English bankruptcy trustee is able to get hold of them, they will be administered in accordance with English law. In an English bankruptcy, all questions of proof, and distribution of assets, are governed by English law (*lex fori*).

ADMINISTRATION.

As to a *Foreign* bankruptcy, the adjudication (or equivalent) does not affect the bankrupt's *immovable* property in England; but does pass the title to his *movable* property in England, if the bankruptcy proceeding takes place in the Court of the bankrupt's domicil. Where the proceeding is in a country in which the bankrupt is *not* domiciled, it seems not clear on the authorities, what effect would be given in the English Courts to an adjudication (or equivalent) as passing title to the bankrupt's movable property in England.

FOREIGN BANKRUPTCY.

With regard to a *discharge* from a debt or liability by virtue of a foreign bankruptcy, that depends on *the proper law of the contract*. The rule (where there is no overriding Act of Parliament) is that what is a discharge according to the law of the country, the law of which is the proper law of the contract, is a *good discharge* all over the world.

DISCHARGE OF LIABILITY.

It remains only to deal with *remedy and procedure*. With regard to jurisdiction, the English Courts assume no jurisdiction over foreign sovereigns, or diplomatic agents, nor over foreign immovables; but subject to those exceptions, you may sue a man in England, if you can catch him here; and in some cases, under Order XI, you may catch him abroad. If the action proceeds in the English Courts, all matters connected with *remedy* and *procedure* are matters of English law, and not of foreign law; the *lex fori* prevails. Therefore, the question whether the proper remedy is specific performance or not, is to be decided by English law. So with regard to evidence, measure of damages, Statutes of Limitation, and other matters affecting or relating to the remedy, all such matters are governed by the law of the country, in the Court of which the remedy is sought.

PROCEDURE.

LEX FORI.

I am aware that in this paper I have presented a bare outline of the English rules governing this great, fascinating, and often difficult branch of law. Exigencies of space and other reasons have compelled me to pass by questions of the greatest interest to the jurist. But I trust this summary may help students to appreciate the general character of this branch of law, and the principles applied to the solution of the questions which arise.

W. H. UPJOHN.

A DAY IN COURT AT HOME AND ABROAD.

Sir Maurice Amos.

§ 1.

So far as the present writer is aware very little has been written upon Civil Procedure of a critical or analytical character since the days of Bentham. This deficiency appears to be observable even in the legal literature of the Continent, which is so much richer than our own in the application to legal problems of critical methods.*

Yet, when rightly viewed, it is scarcely an exaggeration to say that procedure lies at the heart of the law. We have all learnt how intimately the early law both of Rome and of England was bound up with forms of action. The formal divorce of procedure from substantive law which is nowadays almost universal tends unduly to obscure to our minds the social significance of the former—*quot valent regulae forenses tot valent leges*, to amend an old maxim: and the subject is as interesting as any other which, being of practical importance, offers a wide field for the application of logic, legislative skill, and knowledge of human nature.

The undeserved obscurity from which Civil Procedure has suffered as a topic in the Theory of Institutions is, to a large extent, due to the shade cast by the allied but distinct subject of Judicial Organisation. Most well-informed lawyers in all countries know something of the structure of the judicial systems of England, France, and America—to take three typical cases; but few even of the most erudite would be found to know anything about the system of pleadings, the jurisdiction of appeal tribunals in matters of fact, or the machinery for combating "la chicane" in all its forms, in a system not their own. Nor would they know where to go in the British Museum Library to seek such information.

The distinction between procedure and judicial organisation is convenient and important; but it is not entirely definite. The organ cannot be entirely independent of the function; and the questions what powers shall be vested in the judicature, and what duties shall be imposed upon it, have a close connection with the problem of its most appropriate organisation. Where the judge

* The Continent does not draw the hard and fast line that we do between law and legislation. In France, Italy and Germany every law student is taught, by the very atmosphere he breathes, to look upon all law as a more or less successful essay in legislation.

is regarded, as he is in England, as not merely a machine for grinding out answers to conundrums, but also as a governor—as not only a *judex* but also as a *prætectus urbi*—we find, as we should expect to do, that he is escorted by a group of planetary bodies, masters, registrars, official referees, and so on. Where it has been found necessary, as with the French in Morocco, to impose upon the court many of the duties which are elsewhere discharged by solicitors and counsel, we find a functionary as important as he is novel, "le secretaire du tribunal." The rôle of the sheriff in the execution of civil judgments indicates—perhaps in form rather than in substance—a trace of the recognition in England to a greater degree than, for example, in France, of an obligation incumbent upon the State to lend a special authority to the enforcement of judicial decisions.

§ 2.

There is one predominant preoccupation which is common to all civilised systems of procedure; that is, the preoccupation with finality —*ut sit finis litium;* and the various ways in which effect and expression are given at the successive stages of litigation to this recognised need provide many of the principal occasions for divergence between the different existing systems of "practice and pleading." French law, for example, imposes a peremptory time limit for appeals, but affords litigants a wide latitude in raising new pleas before the appellate jurisdiction. English law, on the other hand, frowns upon belated pleas, but recognises a certain measure of judicial discretion in the matter of time for appeals.

The finality imposed by the rules of civil procedure is, of course, of an artificial kind—it is as artificial as an editor's notice, "this correspondence must now cease." It is social necessity and not abstract justice which dictates that litigants shall not be permitted to return to the charge again and again, until one or both of them are convinced of their error or ruined. Finality is not a necessary incident of orderly business; I believe that there is no limit to the number of times which a man may sit for the Little-go, or introduce a Prohibition bill in successive sessions of Parliament. But there is no need to enlarge upon the necessity for securing that there should be finality in the determination of disputed civil rights.

It is important, however, to emphasise the extent to which this consideration must preoccupy the draftsman of a civil procedure code. The present writer had had some practical experience in this sphere, and it was not till he became familiar with the task of working out the detail of suggested amendments to an existing system of procedure that he fully appreciated the inner warfare which eternally severs the two words "speedy justice." Every fresh right given to a litigant, of reply, of amendment, of production, or of "incrimination" of documents, of

appeal, of motion for review, and so on, requires to be limited in time, or by conditions, or both. The guillotine of finality must be allowed to fall some time or other; but to let it fall too soon may work injustice. It must be admitted that where, as in England, the recognised and traditional authority of the judicial bench—"*das Imperium des Richters*"—permits many of these questions to be left to the discretion of the judge, the difficulties of the legislator are greatly diminished. But they are transferred to the judge.*

§ 3.

The following seem to be the most searching questions which can be asked with regard to any system of Civil Procedure:—

(*a*) Is all initiative in the conduct of litigation left to the parties, or does some duty of initiative devolve upon judicial officers?

(*b*) Is the system inquisitorial?

(*c*) Does it adequately secure what the Americans call a "day in Court"?

As this is not a systematic essay on Comparative Legislation, I shall not say any more about the first question than that in some systems we find duties imposed upon the judge, such, for example, as that of convening the parties and endeavouring to effect a compromise of the dispute between them, or such as that of spontaneously investigating the case for each side and defining the issues of law and fact which call for adjudication.

The second question requires some explanation. A French litigant is under an obligation to tell nothing but the truth; but he is under no obligation to tell the whole truth. In England, on the other hand, such institutions as discovery, examination as to means, the affidavit, and the admissibility of the testimony of parties to suits (with the resulting liability to cross-examination) create a totally different atmosphere—one in which each party is enabled to invite the aid of the Court in extorting the truth from his adversary. I believe that, broadly speaking, no court outside the English-speaking world will render assistance of this kind to either party, save to the extent of granting subpœnas to witnesses. It will confine itself to adjudicating upon such evidence as the two parties, by their own unaided exertions, can produce, and as a rule, in the Latin countries, they are under the disability of being themselves inadmissable as witnesses.†

§ 4.

Perhaps the most illuminating of our three questions is the third. Does the system which we are examining make genuine and sufficient

* Theoretically at any rate, the judges on the Continent exercise a comparatively wide freedom in interpreting the substantive law, and have little discretion with regard to procedure, while in English speaking jurisdictions it is broadly speaking true to say that the balance inclines the opposite way.

† It is interesting to remark that whereas in France the Criminal procedure is inquisitorial, and the civil procedure is not, in England it is the other way about.

provision for the "day in Court"? It will be found that, broadly speaking, the answer to this question is in the affirmative as regards the procedural systems of English-speaking countries and in the negative everywhere else.

To make adequate provision for the "day in Court,"—which is the same thing as to secure the full publicity and orality of the proceedings —many practical problems of a subsidiary character have to be solved. It will be interesting to touch upon one or two of these. But before doing so I must enlarge for a moment upon what is implied in the idea of "fully public and oral proceedings." Any member of the public who understands the special vocabulary of the law and who, going one morning into a King's Bench Court or into the Cambridge County Court, manages to get a good seat, hears a case opened, and can spare the time to stay until His Lordship or His Honour has delivered judgment, ought, if he has listened carefully all the time, to know all about the case, and to be in a position to form his own opinion as to whether it has been fairly and patiently tried, and, as regards the facts at any rate, whether the decision is reasonable. If there are witnesses he will have heard them all examined and cross-examined; if there is expert evidence, he will have heard this in full, in precisely the same manner; if the case turns upon the interpretation of documents, or upon the upshot of a correspondence, our dispassionate listener in the public gallery will have heard every relevant passage read out in court, probably several times, and its effect debated between judge and counsel. At the end of the proceedings the spectator will be in a position to give a verdict on the facts, and, if he is a trained lawyer, he will be in a position to give judgment.

This way of doing things appears to most of us to be a matter of course; and it is only when we discover that it is exceptional, and that it is only made possible by remarkable and exceptional conditions and antecedents that we are proud of it.

§ 5.

How differently are civil trials conducted in countries where the ideal of "the day in Court" is unknown, or is not faithfully adhered to.* Let us go into a civil court in the Palace of Justice at the capital of Ruritania. This country, as is well known, enjoys the blessings of a learned, incorruptible, energetic and probably too numerous judiciary, and of a bar to which the same adjectives are applicable. It has a civil procedure code based upon that of France; that is to say a system which has hardly been changed since it was codified by Colbert in 1667. We have arrived in good time to hear the beginning of the day's pro-

* The writer's practical experience of the Latin system of procedure has been acquired in a country which, both in leagues and in culture, is remote from the fountain head, and it is therefore possible that, in some respects, his judgment of the inadequacy of the Latin system to secure the orality of civil trials might require readjustment in the light of the practice at Paris or Rome.

ceedings. The first hour is spent in a discussion of the list for the day, which contains thirty cases. Nobody expects or intends that more than twelve cases shall be heard. Finally the court, having caused the thirty cases to be called, and having heard summary argument for and against adjournments, sends eighteen cases over, and settles down to hear the remaining twelve. As it is now eleven o'clock, and the court will sit till four o'clock, with an interval of an hour for lunch, it can spare on an average twenty minutes to each case. Long practice, some previous acquaintance with the dossiers, and a knowledge of the idiosyncracies of the counsel engaged, will enable the President to distribute the time available with some reference to the nature of the matter in hand. In point of fact what happens on the day of our visit is that an hour is given to the arguments on an interesting right of way case which raises an unfamiliar point of law and where the facts are not in dispute; half a hour is given to each of two other cases, a quarter of an hour each to six more, one case is again adjourned, and in two very dull cases, which turn exclusively upon the details of reports by referees on tangled trust accounts, the President successfully beguiles counsel into admitting that oral argument may well be dispensed with, and that they are prepared to rely upon the written briefs which are already in the possession of the court. When we come out at four o'clock we shall certainly have some idea of the points in issue in nine of the cases. With the right of way case we shall feel thoroughly *au fait*. But as to the others we shall only have the haziest notion as to the facts or as to which way the decision of the court should or will go. We may have discovered from the speeches of counsel that in one dossier are to be found the minutes of evidence taken some weeks ago before a referee, in another the minutes recording a *descente sur les lieux*—an official view of the premises in litigation by a judge who is or was at the time a member of the court.

In other files again, we understand, are to be found the reports of experts: one upon the medical condition of the plaintiff (a bricklayer injured in the course of his employment); another reporting on the authenticity of the endorsement on a promissory note; another by an architect upon the causes of the premature collapse of the buildings which is the *res litigiosa* in the ninth case. But we shall have heard none of these minutes or reports read carefully through and commented upon, we shall have heard no witnesses, we shall have heard no documents read, and we shall have heard little or no debate between bench and bar. And all the time we shall have noticed that the court was in a hurry: the President had his eye on the clock, and frequently urged counsel to be more concise and to remember that there was other business besides theirs to attend to. As it is, the plan made at the beginning of the morning has not been completely carried out, and one case has had

to go to the bottom of the list because there was no time to hear it to-day. In every case judgment has been reserved, and we hear that the decisions will be formally delivered in a fortnight's time.

§ 6.

In the luncheon interval we have been introduced to a leading member of the bar, who had had a case adjourned at the beginning of the morning. He is full of wrath. He explains that it is a heavy case, involving the application of a badly drafted marriage-contract to a tangled and fluid mass of personal and real property, complicated by deaths, divorces, conflict of laws, and negligent administration. It is a case that would require at least two hours to do justice to it. As a matter of fact our friend had spent three hours at least last night preparing himself, and that was the third time he had done so. Now the case has gone over for six weeks, and he supposes that he will have to get it up a fourth time. It really isn't worth while, he says, taking all that trouble. We learn, however, that though the Court sits only three days a week, it is regarded as being very hardworking; its normal average output of ten judgments per sitting is considered to be exceptionally creditable. We must understand, we are told, that the judges have other and more arduous duties to perform than merely sitting in court. They have to study their cases—and this is one of those rare chambers in which, as the bar understand, it is not uncommon for the more important dossiers to be read by all the five members of the court. Then they have to meet for deliberation; two days a week at least that takes them; and it is in the judges' council room, as everyone knows, that the real trial takes place, at any rate if the course of justice is so rarely fortunate as to be served by a pronounced spirit of equality, of professional ardour, and of mutual criticism in the members of the chamber. But normally the rapporteur in each case, who will have to write the judgment, will have everything his own way. Then the judgments have to be written; and in addition to that, the several members of the court have to find time to hear witnesses, to interrogate parties, to view premises and so on. Oh yes, the judges, or most of them, are busy enough. But they do their business in private.

One thing that we shall have observed is that all the cases mentioned during the day, both those which were adjourned at the beginning of the morning and those which were argued, seem to have been at different stages. The adjournments have shown us that the cases are gradually being matured by successive appearances in court. In one, time was asked for to cite fresh parties; in another time was asked for to obtain evidence from abroad; in a third, which gave rise to some argument, a motion was granted for a joinder of suits. Then on the reserved list we noticed that in several cases final judgment was not asked for; the question under discussion was as to the manner in which

proof should be furnished—by witnesses, experts, or interrogatories, as the case might be; in each of these cases the court was asked to make an interlocutory order, and, if the motion was granted, to adjourn the case until the order had been discharged. In short, the list for the day appears to have contained an undifferentiated mixture of actions still in various stages of preparation—still in chambers, so to speak—and cases for trial; if indeed we can say that we have heard any trials at all, where the proceedings in the suits ready for final decision consisted of motions for judgment, and replies thereto, based upon evidence which by hypothesis was already in the possession of the court, though the judges might not be, and probably were not, as yet familiar with it.

A morning spent in the Appeal Court will not greatly add to our stock of travellers' tales; save that we shall discover that in Ruritania proceedings in an appeal differ little from a retrial. Though on the one hand it is true that all the evidence presented in first instance continues to form part of the record, yet on the other the parties have no difficulty in presenting fresh evidence, at least of a documentary character, or in raising fresh pleas; they may it is true have some difficulty in getting permission to adduce fresh testimonial or expert evidence, but this is not a peculiarity of appeal proceedings. The result of all this is, as we learn, considerably to lower the importance, as compared with our English standard, of the decisions on points of fact reached by the "trial court," to borrow a pregnant Americanism.

§ 7.

Now let us suppose that six months after our visit to Ruritania the whirligig of politics brings our legal friend into office as Minister of Justice; and that one of his first acts is to write to ask us to tell him how Ruritania practice might be improved. How shall we reply?

The first thing to do is to make a clear diagnosis of the disease. We shall not be far wrong if we say that what is amiss is that in the dominions of the Hentzau dynasty a civil trial is not regarded as necessarily involving a continuous and intimate collaboration between bar and bench. It is the absence of this idea of necessary collaboration which makes the judges do so much of their work in private, on the basis of written records; and it is the fact that it is recognised to be proper, or believed to be inevitable, that much of their work should be done in the absence of the parties or their counsel that so greatly lowers the importance in the eyes of all concerned of the oral proceedings in court. The principal results of this depreciation of the oral proceedings are the following:—

(*a*) Litigants are not in a position to secure or to be confident that due consideration has been given to all the contentions which they think important; and if the case, as sometimes happens, presents itself to the judges in a light in some degree different

from that in which it has presented itself to either of the parties, the latter may very well have little or no opportunity of securing the adequate criticism of the novel point of view.

(*b*) It tends to throw the whole topic of Evidence, its presentation, criticism, and appraisement, into the shade. The law of Evidence and the art of cross-examination are peculiar to jurisdictions which attach supreme importance to orality.

(*c*) The need is not felt for saving the time of the court by relieving it to the utmost of administrative and "preparatory" matters; and the resulting *olla podrida* of business in its turn reacts upon the prestige of the oral proceedings and diminishes the value of the little time allotted thereto.

(*d*) In some jurisdictions, we believe, the difficulty of providing for genuine and adequate oral proceedings has led to the abandonment of insistence upon the appearance of the parties. Where, as is usually the case, this surgical operation has appeared too drastic, the great competition for the limited time of the court tends to result in the multiplication of harassing adjournments.

§ 8.

Now I suggest that what we ought to write to our foreign friend is something to the following effect. "We do not advise you to adopt the civil jury; indeed that is a matter of judicial organisation, and you have only consulted us about procedure. But we do advise you so to reorganise your civil procedure that it would be possible at any moment to bring in a jury from round the corner with no other readjustment than the provision of twelve chairs. It is the civil jury which is mainly responsible for the distinctive marks of English procedure and which accounts for almost all the merits which you are so good as to acknowledge. With us, even where, as is very commonly the case, there is no jury present in the flesh, it is always present in the spirit, dominating the form and order of the proceedings and securing the 'day in the court' with all that that implies." To justify these remarks to a foreigner, our letter would, of course, have to be a long one. In these pages no such developments are necessary. It is sufficient to make the following observations.

The jury can, in practice, only be got together once, so that, if one day is not sufficient, having once started, the case must go on from day to day. All evidence must be produced and all matters of fact must be fully debated before it.

These simple facts have the following, among other, consequences. A capital distinction has to be made between the "trial of the action"

and all interlocutory and preparatory proceedings. All evidence must be ready for the critical day, and this implies that the issues must be settled and all questions such as those relating to joinder of parties, to particulars, discovery, interrogatories and so on, must be decided beforehand. Once the case is ready and set down for trial on a day approximately fixed, and the witnesses summoned, any prolonged adjournment must be highly exceptional. The distinction between matters of fact and matters of law will be emphasised and the former will be raised to their true level of importance. It will be practically impossible for appeals to degenerate into new trials. Witnesses will be judged, not only by what they say, inadequately recorded in a "proces-verbal" but by the way they say it. No substantial distinction will be made between expert and other evidence; expert witnesses, unable to shelter behind the obscurity of a learned report, will have to endeavour to make themselves understood and believed by plain men; documentary evidence will have to be fully expounded and appraised in open court. A close and continuous contact of mind will be ensured between judge and litigant; to speak symbolically, there will be no "dossier." Undue expedition in disposing of cases will be made difficult; and to give the court time to try cases with due patience, those remarkable "preparatory" institutions, such as Order XIV, will be found to be necessary which in this country reduce to a small fraction the ratio of actions heard to writs issued. Finally, since there must be great elasticity in the time allowed for each case, and since adjournments are practically impossible when the trial is once started, it will be found necessary as a general rule to set down cases for hearing, not on a specified day, but in a specified place on a list—but that is a large self-contained subject. The short point then is that to bring civil trials up to the standard of publicity and orality which seems desirable, and is everywhere recognised as necessary in criminal matters, it seems to be both sufficient and necessary to order the proceedings from beginning to end, as though the substantial issues of fact were to be decided by a jury.

§ 9.

A foreign critic would probably say that there is a fourth criterion of a civil procedure system which is at least as important as those we have mentioned; and that is the question "is it expensive?" Judged by this standard it is to be feared that English methods, in other respects so admirable, would not come out very well. A foreigner would be likely to say that in the pursuit of technical perfection we have thrown too great a share of the task of bringing out the truth upon the parties themselves, or their professional advisers and representatives. The day in court puts a great premium upon forensic skill; and its necessary corollary, an adequate system of preparation, makes considerable

demands upon the judgment and experience of solicitors and counsel. This is not the place to examine how far these criticisms are justified, nor whether and in what ways, the expense of litigation might be reduced without forfeiting what are indisputable advantages. But unfortunately it must be admitted that the question of expense cannot be wholly ignored even in the administration of justice.

M. S. Amos.

CORPORATE LIABILITY IN TORT AND THE DOCTRINE OF ULTRA VIRES.

A. L. Goodhart.

The question whether a statutory corporation should be held liable for torts committed in the course of an *ultra vires* undertaking is one of particular interest to the student of law for two reasons. First, the principle of *ultra vires* emphasises most clearly what Dr. C. T. Carr[1] calls "the incidents of corporateness." "Perhaps, indeed," as Mr. Brice[2] has written, "the Law of Corporations may be considered for most practical purposes as in reality only the application and development of the doctrine of *ultra vires*." Secondly, owing to the fact that there are only a limited number of cases dealing with this question, and that even these are but of doubtful authority, a writer is free to suggest his own solution. This lack of precedent does not, however, mean that the problem is devoid of practical importance, for, with the rapid increase in the number of business companies, it is probable that the courts will have to deal with it in the near future. The Cambridge Law Journal was, therefore, fortunate when it was able to publish Professor Edward H. Warren's article "Torts by Corporations in Ultra Vires Undertakings," in the 1925 number. This article is of such interest that the writer of the present paper may be excused for discussing at considerable length some of the points raised by it. Professor Warren quotes Sir John Salmond,[3] and, as the latter's view that a statutory corporation ought to be held liable for torts committed in the course of an *ultra vires* undertaking is familiar to most English students, it will be convenient to consider Salmond's position first. Mention must also be made of a learned article "Privileges and Powers of a Corporation and the Doctrine of Ultra Vires," by Professor A. J. Harno, in the Yale Law Journal.[4]

[1] Law of Corporations, Chap. I.
[2] Doctrine of Ultra Vires. Pref. to 3rd ed. p. xvi.
[3] Law of Torts, 3rd ed. pp. 58, 59, 60.
[4] Vol. xxxv, p. 13.

1. In discussing this question Salmond says[5]:

> "In other words, the rule that a corporation is not bound by contracts which are *ultra vires*, is commonly said to apply also to torts which are *ultra vires*, in the sense that they are committed in the course of some activity which is beyond the limits of the corporation's powers. There is, however, no sufficient authority for any such exemption of corporations from the consequences of their disregard of the limits of their powers. It seems contrary to principle, and has been decisively rejected in numerous American decisions."

The two American cases which he cites are *First National Bank* v. *Graham*,[6] and *Salt Lake City* v. *Hollister*.[7] It is important to note that in neither of these cases was it determined that a corporation was liable for a tort committed in the course of an *ultra vires* undertaking. It is true that in the *First National Bank* case the question was discussed, but the Court found that the tort was committed in the course of an *intra vires* undertaking, and said: "it is unnecessary to pursue this view of the subject further." The *dicta* in this case must be considered unsatisfactory. Mr. Justice Swayne said: "Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application," but the only apparent reason advanced for this statement was that corporations are "liable for the acts of their servants while such servants are engaged in the business of their principal, in the same manner and to the same extent that individuals are liable under like circumstances." This evades the essential question whether an *ultra vires* undertaking can be held to be the business of the corporation. As authority, the learned Justice cited *Foster* v. *Bank*[8] three times, but that was a case based on contract.

The *Salt Lake City* case was not even a case in tort, but involved a question as to the internal revenue tax. Tax cases depend upon special statutes, and it is as a rule dangerous to cite them as establishing general principles. The remarks of the Court as to corporate liability in tort were, therefore, pure *dicta*, but the reason given for the suggested view is of interest. Mr. Justice Miller said:

> "The truth is that with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of

[5] 6th ed. p. 65.
[6] 100 U.S. 699.
[7] 118 U.S. 256.
[8] 17 Mass. 479.

power in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."

In other words, Mr. Justice Miller acknowledges that it is contrary to the general principles on which corporate liability is founded to hold a corporation responsible in such cases, but argues that it is necessary on grounds of public policy. The Court is asked to depart from the established rules of law in the interests of social necessity. It is at least doubtful whether an English court would feel itself free to legislate in so drastic a manner. Later in this article it will be suggested that public policy can be served in another way, without violating the accepted principles of law.

Although Salmond cites the above cases with approval, he bases his own conclusion upon a different ground.

> "The true principle," he writes,[9] "is, it is submitted, the following: Every act done, authorised, or ratified on behalf of a corporation by the supreme governing authority of that corporation, or by any person or body of persons to whom the general powers of the corporation are delegated, is, for the purpose of the law of torts, the act of the corporation itself, whether *intra vires* or *ultra vires* of the corporation, and the corporation is liable accordingly for that act or for any tort committed in respect of it by any agent or servant of the corporation within the scope of his authority or employment. If, for example, a municipal council establishes the business of a tramway, the municipal corporation will be liable in tort for the negligence of the servants employed in the management of the tramway, or for any nuisance created by the working of it, notwithstanding the fact that the business so undertaken is beyond the limits of the corporation's statutory powers."

With this paragraph must be read the following statement in Salmond's Jurisprudence[10]:

> "A legal person is as incapable of conferring authority upon an agent to act on its behalf, as of doing the act *in propria persona*. The authority of the agents and representatives of a corporation is therefore conferred, limited and determined, not by the consent of the principal, but by the law itself. It is the law that determines who shall act for a corporation, and within what limits his activity must be confined. Any act which lies beyond these legally appointed limits will not be imputed to the corporation, even though done in its name and on its behalf."

[9] 6th ed. p. 66.
[10] 7th ed. p. 345.

Returning to Salmond's example of the tramway; the municipal council, being the agent of the municipal corporation, can only bind the corporation by acts done within the scope of its authority, for anything "beyond these legally appointed limits will not be imputed to the corporation." This authority is limited by the law itself. Does the council's authority include the establishment of the business of a tramway? Clearly no, because the council only has "the general powers of the corporation," and the business of tramways "is beyond the limits of the corporation's statutory powers." If the council attempts to purchase a tramway system the contract will be void, for in *Ashbury Railway Carriage Co.* v. *Riche*[11] a substantially similar contract was held invalid. Nor can the council make a valid contract employing a servant to drive a tram, for there is no distinction between a contract for service and a contract for property. The driver of the tram will, therefore, not be a servant of the corporation, for the relation of master and servant is a contract relationship,[12] and the contract of employment is void. As Anson has said,[12A] "No one can appoint an agent who is not otherwise capable of entering into contracts."

On what principle, then, can we hold the corporation liable for a tort committed by a tram driver who is not its servant? Salmond himself says:[13] "In the absence of anything to the contrary, it is presumed that the Legislature intended the corporation to incur the same liabilities as would be incurred by an individual doing the same things." A, without authority, engages B to be the servant of C. Is C liable for the torts of B, committed in the course of his supposed employment? Clearly not. Can any distinction be drawn because of the fact that C, instead of being an individual, is a corporation? How can the municipal corporation be held liable for the torts of B, the tram driver, if A, the municipal council, did not have authority to make a valid contract of employment? The question is not whether a corporation ought to be held liable for the torts committed by its servants in the course of an *ultra vires* undertaking, but whether the relation of master and servant exists between the actual tortfeasor and the corporation.[14] A corporation is held liable for torts committed in the course of an *intra vires* undertaking because it can employ the servant to do the act which he has done tortiously. It is not liable for torts committed in the course of an *ultra vires* enterprise because

[11] L.R. 7 H. L. 653.
[12] Smith's Law of Master and Servant, 6th ed. p. 1.
[12A] Law of Contract, 16th ed. p. 404.
[13] Law of Torts, 6th ed. p. 67.
[14] Halsbury's Laws of England, Vol xx, p. 252.

it cannot employ a servant to do the act, even if it were to be done rightfully.[15]

It is hardly necessary to point out that the above argument applies not only to a case where the whole employment is *ultra vires* and void, but also where a servant, validly employed, does a particular act which is *ultra vires* the corporation, and, therefore, outside his contract of employment. Even though the act in these circumstances is done in the interests of the corporation, the corporation cannot be held liable. As Blackburn J. said in *Limpus* v. *London General Omnibus Co.*[16]: "It is not universally true that every act done for the interest of the master is done in the course of the employment. A footman might think it for the interest of his master to drive the coach, but no one could say that it was within the scope of the footman's employment, and that the master would be liable for damage resulting from the wilful act of the footman in taking charge of the horses."[16A]

2. Professor Warren begins his article with the following moot case. The X Bicycle Company, whose objects in the memorandum of association are stated to be "the manufacture and sale of bicycles," loses money. On the recommendation of the directors, and "*with the approval of all the shareholders*," the manufacture of bicycles is stopped, and the funds of the company are employed in maintaining a motor omnibus service. The driver of one of these omnibuses, "*while acting within the scope of his employment as prescribed by the directors of the company*," by his negligence, runs into A. The driver is financially irresponsible. A sues the X Bicycle Co., and that company defends on the ground that maintaining the omnibus service was *ultra vires*. Should this defence be successful?

This case presents in an admirable manner the various problems involved in "*ultra vires*" torts. It is important to note that Professor Warren uses the phrase "*while acting within the scope of his employment as prescribed by the directors of the Company.*" Employment by the directors is not necessarily employment by the company. Before we can determine the latter we must see whether the directors were authorised to employ the servant as prescribed by them. Salmond's problem, which we have quoted above, does not bring out this point so clearly.

Professor Warren's arguments do not follow the line taken by those of Sir John Salmond. He acknowledges, which the latter does

[15] In *Harmon v. Siegel-Cooper Co.*, 167 N.Y. 244, a corporation, the proprietor of a department store, was held liable for malpractice in the business of dentistry. The Court of Appeals said: "Though it was beyond the corporate powers of the defendant to engage in the business this does not relieve it from the torts of its servants committed therein."

But was the dentist a servant of the corporation? Could he have sued it for his salary? It is submitted that in England his contract of employment would be held to be absolutely void. *Ashbury Railway Carriage Co. v. Riche*, *supra*.

[16] (1862) 1 Hurlstone & Coltman 526,542. See also *Ruben v. Great Fingall Consolidated* [1906] A.C. 439,444 and *Storey v. Ashton* L.R., 4 Q.B. 476.

[16A] *Beard v. London General Omnibus Co.* [1900] 2 Q.B. 530.

not, that if the reasoning of the Court in the *Ashbury Company* case is accepted, then a statutory company cannot be held liable for a tort committed in the course of an *ultra vires* undertaking.

> "The result of the *Ashbury Company* case may be accepted," he says on p. 188, "and, nevertheless, relief be given to the plaintiff in the tort case. But I am unable to see how the reasoning of the court . . . may be accepted, and, nevertheless, relief be given to the plaintiff in the tort case. The thought of Lord Cairns was that the area of corporate activity was defined by the statement of the objects, and that there could be no corporate activity except in that area. That is equivalent to saying that the company has no capacity to do an *ultra vires* act. It no more has capacity to commit a tort in the course of an *ultra vires* undertaking than to make a contract in the course of that undertaking."

This makes further argument purely academic as far as English law is concerned, for the *Ashbury* case is a binding precedent for all courts. Nor can we accept its result and reject the *ratio decidendi* on which a unanimous court based its judgments, for it is the reasoned principle which is found in the case, and not merely the conclusion which is reached, which forms the precedent.[17] The principle of the *Ashbury* case is that a statutory "company has no capacity to do an *ultra vires* act." Professor Warren may prove that the arguments advanced by the Court for arriving at that principle are fallacious, but that cannot affect the authority of the case.

Professor Warren criticises the judgments in the *Ashbury* case on two main grounds, both depending for their validity in large part on an analogy between chartered corporations and statutory companies.

(A). "Chartered corporations," he writes,[18] "are corporations at the common law. They have general legal capacity. The legislature should be presumed to follow the common law model rather than to depart from it." Therefore, in construing the Companies Act, 1862, the Court should have followed the rule by which a chartered corporation is bound by all the contracts entered into in its name and under its seal by its authorised agents. This point seems at first glance a valid one, but the House of Lords rejected it unanimously. Although superficially a common law corporation and a statutory company resemble each other, they differ fundamentally in origin and character. So Lord Hatherley, in the *Ashbury* case, said :[19]

[17] *Fisher v. Prince*, 3 Burr. 1364. Lord Mansfield: "The reason and spirit of cases make law; not the letter of particular precedents." *Cage v Acton*, 12 Mod. 294. Lord Holt: "The reason of a resolution (judgment) is more to be considered than the resolution itself." and see Wambaugh's Study of Cases, 2nd ed., P. 15: "The decision is a precedent for the doctrine necessarily involved in it, etc."

[18] P. 183.

[19] P. 684

> "this Act of Parliament was passed with the view of enabling persons to carry on business on principles which were, up to that time, wholly unknown in the general conduct of mercantile affairs in this country."[20]

Lord Justice Bowen put this point concisely in the later case of *Baroness Wenlock* v. *River Dee Company*:[21]

> "When you come to corporations created by statute, the question seems to me entirely different, and I do not think it is quite satisfactory to say that you must take the statute as if it had created a corporation at common law, and then see whether it took away any of the incidents of a corporation at common law, because that begs the question, and it not only begs the question, but it states what is an untruth, namely, that the statute does create a corporation at common law. It does nothing of the sort. It creates a statutory corporation, which may or may not be meant to possess all or more or less of the qualities with which a corporation at common law is endowed. Therefore, to say that you must assume that it has got everything which it would have at common law unless the statute takes it away is, I think, to travel on a wrong line of thought."

Chartered corporations, in general, are limited to hospitals, colleges, etc., and are concerned with business only in exceptional cases. Statutory companies are, almost universally, developments of business partnerships. A chartered corporation, as a rule, can only contract under seal, which means that its contracts are of a formal character. On the other hand, most of the contracts of a business company are not under seal. The list of differences could be extended to wearisome length, but most of them will be found to depend upon the important fact that a chartered corporation is usually organised for service, while a business company is organised for profit. (We are not here concerned with the modern colonial business corporation.)

Professor Warren seems to assume that the rule which applies to chartered corporations is a desirable one. When we study the famous case of *Sutton's Hospital*,[22] which established the rule, we cannot fail to notice that the reasoning is hardly convincing.[23] At that time the various principles of corporate liability had scarcely been developed. They were understood to so small a degree that a corporation was not held liable in tort. When Professor Warren says that the law[24]

[20] And see Archibald, J. in the Exchequer Chamber. L.R. 9 Ex. at p. 292: "I admit that at common law (as was resolved in the case of *Sutton's Hospital*), when a corporation is duly created all other incidents are tacite annexed. x x; but the question under consideration has reference to the creation of corporations by statute with a limited scope and objects, and to the true construction of the statute law in regard to such bodies, a question which depends necessarily to a great extent, where the legislative provisions are not unmistakeably clear and express the other way, on the general policy of such legislation."

[21] 36 Ch. D. 675, n. at 685, n.

[22] 10 Co. 1.

[23] Grant on Corporations, p. 131.

[24] P. 181.

"always has been that a chartered corporation can do an *ultra vires* act," he means that it could always be bound by *ultra vires* contracts. But it was not until the 19th century that corporations could be sued in tort. If the *ultra vires* rule of the chartered corporation had been applied to the modern business company, creditors and shareholders who had purchased their shares after the *ultra vires* contracts had been entered into, would be largely unprotected.[25] The *Ashbury* case was decided fifty years ago. Since that time the law relating to statutory companies has been amended a number of times, and in 1908 the great Companies (Consolidation) Act finally codified the law on this subject. Nevertheless, no change has been made in the rule that companies are not bound by *ultra vires* contracts. Apparently it was felt that public policy would not be served by introducing the laxer rules which apply to chartered corporations.

(B). Professor Warren's second criticism is that the Court did not have[26] "the distinction between legal authority and legal capacity clearly in mind. He (Lord Cairns) made 'It can not' to follow upon 'It should not'." This criticism assumes that a strong House of Lords must have been peculiarly obtuse. Plaintiff's counsel (Giffard, Q.C., afterwards Lord Halsbury, and Benjamin, Q.C.—neither of them likely to overlook a crucial point), stressed the argument that a chartered corporation could be bound by a contract which its charter did not authorise it to enter upon. Such a corporation had capacity to enter upon a contract even though authority was lacking. The judgments show that this argument was considered and rejected when the Court was urged to apply it to statutory companies. Lord Selborne makes this clear:[27]

> "I think that contracts for objects and purposes foreign to, or inconsistent with, the memorandum of association are *ultra vires* of the corporation itself. And it seems to me far more accurate to say that the inability of such companies to make such contracts rests on an original limitation and circumscription of their powers by the law, and for the purposes of their incorporation, than that it depends upon some express or implied prohibition, making acts unlawful which otherwise they would have had a legal capacity to do."[28]

and Lord Cairns said:[29]

> "The question is not as to the legality of the contract; the question is as to the competency and power of the company to make the contract."

[25] *Ashbury Railway Carriage Co. v. Riche* at p. 684.
[26] P. 186.
[27] P. 594.
[28] And see Lord Chelmsford, p. 679, and Lord Hatherley, p. 685.
[29] P. 672.

In other words, the Court did not consider whether the company was authorised or forbidden to enter into the contract, but whether it had the power to do so. Lord Cairns knew that a chartered corporation "could" even though "it should not"; why then should he make "it can not" follow upon "it should not" in the case of a statutory company?

Having stated his criticisms of the judgments in the *Ashbury* case, Professor Warren suggests that the result which was reached by the Court could have been based on other and better grounds.[29A] "On these grounds the plaintiff should fail—not because the company could not make the contract, but because the company ought not to have made the contract—and the plaintiff knew, or ought to have known, that fact; so that he has voluntarily participated in improper corporate action." But surely this, too, would be a radical departure from the rules which apply to a chartered corporation, for, in the case of a chartered corporation, the person contracting with the corporation is not estopped from taking advantage of the contract. On what possible distinction of principle could a plaintiff be estopped in the case of a statutory company and not in the case of a chartered corporation? In both cases he has an equal opportunity of knowing the lack of authority; if it is wrong to make a contract with a statutory company on a matter which lies outside its memorandum of association, it is equally wrong to make a contract with a chartered corporation which lies outside its charter. It is noteworthy that in the *Ashbury* case counsel for the defendant company did not even suggest this argument, and there is not the faintest ground for thinking that this entirely novel idea of estoppel was ever considered by the House of Lords.

But even if the House of Lords in the *Ashbury* case had held the company liable on the *ultra vires* contract, the general liability of companies for torts committed in the course of *ultra vires* undertakings would only be effected in rare instances. Why does Professor Warren in his moot case state that the omnibus service was undertaken "*with the approval of all the shareholders*"? The reason is obvious, and can be found in the judgment of Blackburn J. in the Exchequer Chamber in the *Ashbury* case, which Professor Warren cites with approval. He held that a statutory company could be bound by an *ultra vires* contract, but he said[30]:

> "If the board in a joint stock company, or a partner in a common law partnership, make a contract beyond their authority, it does not bind the company in the one case, or the firm in the other. . . . The question on which there is doubt and difficulty is, whether in the case of a company incorporated under the Com-

[29A] P. 188.
[30] L. R. 9 Ex. 224, 255.

panies Act, 1862, the unanimous shareholders can ratify a contract made in the name of the company, but beyond the authority of those who made it."

and[31]

> "No person can be entitled to fix the company with a contract made by the board for any purpose beyond those objects, on the ground that the board had an ostensible or apparent authority to make contracts of that kind, but must, in order to fix the company, at least prove an actual authority given to the board to make the particular contract he seeks to enforce."

The directors are the agents of the company,[32] and on the ordinary principles of agency they can only bind the company by contracts made within the scope of that agency. As Blackburn J. has pointed out, it would take the unanimous approval of all the shareholders before that authority could be extended. "A majority, however large, cannot bind a dissentient minority, however small, to do that which is not authorised by the constitution."[33] This authorisation must be positive, for a mere failure to object is not sufficient.[34] In how many modern business companies could such unanimous approval be shown? Liability could always be avoided if even one shareholder were careful to withhold his approval.

Professor Warren's article can, therefore, bring only cold comfort to an English lawyer who has to argue that a statutory company is liable for torts committed in the course of an *ultra vires* undertaking. He must first upset the unanimous reasoning of the House of Lords in the *Ashbury* case, remembering always that in a more recent judgment Lord Halsbury has said:[35] "It certainly would not be easy to find a more supreme authority than the judgment in that case." Having done this, he must prove that all the shareholders have authorised the *ultra vires* undertaking.

Before leaving Professor Warren's article we must consider his use of the word "capacity." He brings out clearly that by capacity he means legal capacity and not physical capacity.[36] When we say that a corporation has legal capacity to do an act, we do not mean that the corporation itself has done the act. What is meant is that a duly authorised agent of the corporation has done an act which is attributed to the corporation. It is, therefore, a question of agency in

[31] P, 265.
[32] Lindley on Companies, 6th ed. p. 205.
[33] Halsbury, Laws of England, Vol. VIII, §377, *Simpson v Denison* (1852) 10 Hore, 51,55; *Pickering v Stephenson* (1872) L.R. 14 Eq. 333,340; *Burland v Earle* [1902] A.C. 83, P.C.
[34] *Houldsworth v. Evans*, 3 H.L.C. 249,276, "In joint stock companies absent shareholders should never be bound to do anything more than to assume that the directors are doing their duty," and see *Spackman v. Evans* 3 H.L.C.171.
[35] *Amalgamated Society of Railway Servants v. Osborne* [1910] A.C.87, and see Lord Watson's judgment in *Baroness Wenlock v. River Dee Company*, X App. Cas. 354,362.
[36] At p. 183. "A corporation acts through human beings, and the question whether a corporation has acted is always to be answered by inquiring (a) whether human beings have acted, and (b) whether it is proper to give corporate significance to their acts."

all cases.[37] It is a dangerously easy step, however, to confuse legal capacity with physical capacity. Thus in an interesting article "*Ultra Vires* Corporation Leases,"[38] E. A. Harriman writes:

> "A married woman at common law could enter into a contract in one sense; she could sign, seal, and deliver a deed, but the deed was not her legal act, because she lacked legal capacity to contract. The corporation is a person by definition. Is the contractual capacity of this person general, like that of a natural person, or has the corporate person only partial or limited capacity?"

The writer is here comparing incommensurable things. A married woman has physical capacity to enter into an agreement. The only question in her case is whether she shall be legally bound by her own act. A corporation, as Professor Warren says, has no physical capacity to do an act itself. The question in the case of a corporation, therefore, is whether the corporation shall be legally bound by the act of another. By using the term "capacity" we tend unconsciously to think that we are dealing with acts done by the corporation itself. If the question is put as "Ought a corporation be bound by its *ultra vires* contracts?" we naturally are inclined to say yes, because a person ought to be held liable for his own acts. But if the question is put more accurately as "Ought a corporation be bound by contracts entered into in its name by persons who are not its agents or who are acting outside the scope of their agency?" the answer, we submit, will be no. For this reason we have not used the term "capacity" in the course of this article.

Even when used as Professor Warren uses the term it is apt to obscure the point at issue. He discusses[39] the argument that a corporation cannot commit a tort because Parliament, in creating the corporation, did not authorise it to commit a tort, and the corporation can do only what Parliament intended that it should do. "The answer to this reasoning," he writes, "is that although the legislature did not intend that the corporation should have authority to commit a tort, it did intend that it should have capacity to commit a tort." We suggest that the answer can be put in a simpler form. The legislature intended the corporation to be bound by the ordinary law of principal and agent and master and servant, and it is, therefore, liable for its servant's torts done within the course of his employment. If A's servant B commits a tort within the course of his employment we do not say that A is liable because he has "capacity to commit a tort." We say that A is liable because B is his servant.

[37] Pollock's Law of Torts 12th ed. at p. 59, "But this is really part of the larger question of the liability of principals and employers for the conduct of persons employed by them; for a corporation can act and become liable only through its agents or servants.

[38] 14 Harvard L.R. 332, 334.

[39] P. 184.

3. Lack of space forbids more than a cursory examination of Professor Harno's article. He presents a third theory of corporate liability. He begins by suggesting that[40] " it would be helpful to our thinking in this subject if a differentiation were made between the concepts *power* and *privilege*." These are Professor Warren's " capacity " and " authority " under different names. [41]" Once the discrimination is made between privileges and powers, a logical basis is found for the modern cases which make corporations responsible for torts and crimes." The English courts have accepted a more obvious theory; as Sir Frederick Pollock[42] points out, the basis has been found in the doctrine of *respondeat superior*. Why is this not a sufficiently logical basis?

Professor Harno's main argument is, however, that if a realistic view were taken of the nature of a corporation our thinking " would be simplified further." He does not show, however, what practical results would follow from the acceptance of this theory. Would the corporation be bound by the *ultra vires* acts of the directors as well as by those of the shareholders? Would the latter have to be unanimous? " The thought is ventured," he says,[43] " that if the courts had emphasized the corporate entity and the special creation less, and had viewed the corporation more as a group of individuals which had certain privileges, and then had made distinction between privileges and powers, less difficulty would have resulted." It is difficult to see what is the relation between the realist theory and the differentiation between power and privilege. Sir Frederick Pollock, in his article " Theory of Corporations in Common Law,"[44] accepts the realist theory, but points out that this acceptance does not affect the question of *ultra vires*:

> " But the English doctrine of Ultra Vires, as we call it, does not really go back to any ultimate conception as to the nature of a corporate body. It is a doctrine, to use a convenient American term, of constitutional limitations. If the same authority which created a given juristic person, or authorized the constitution of many juristic persons by the performance of certain conditions, has at the same time set bounds to the legal competence of such persons, bounds which are matter of public knowledge, then acts professedly done in their name and exceeding those bounds are nullities. No English lawyer can question the power of Parliament (of the King without Parliament we do not speak for the moment) to impose such disabilities. The problem is at bottom one of interpretation, to ascertain what was the will of Parliament in the given case or class of cases."

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40 P. 13.
41 P. 19.
42 Law of Torts, p. 59 n. (c).
43 P. 28.
44 XXVII L.Q.R. 219, 222.

The rule that a company is not liable for a tort committed in the course of an *ultra vires* undertaking, would seem necessarily to entail a hardship on the person injured by such a tort. Taking Professor Warren's case, the victim of the accident cannot recover from the X Bicycle Company, and the driver of the omnibus is financially irresponsible. There would, however, be no hardship if the directors and the shareholders, who had authorised the *ultra vires* undertaking, were held personally liable. With diffidence, we suggest that it is along this line that the law should move. Directors would not engage upon *ultra vires* enterprises if they realised that they themselves would be held responsible; thus the funds of the company would not be diverted into these undertakings to the disadvantage of the creditors and of future shareholders. As directors are in most cases financially responsible, a person injured in the course of such an undertaking would be able to recover damages. Public policy would, therefore, be doubly served.

To hold directors liable in such cases would entail merely a rational extension of the principle laid down in *Kelner* v. *Baxter*.[45] Willes, J., states the *ratio decidendi* of the case:[46]

> "Both upon principle and upon authority, therefore, it seems to me that the company never could be liable upon this contract; and, as was put by my Lord, construing this document *ut res magis valeat quam pereat*, we must assume that the parties contemplated that the persons signing it would be personally liable."

And Byles, J., said:[47]

> "I am of the same opinion. At first, I must confess, I entertained some doubt, the contract appearing on the face of it to have been entered into by the defendants on behalf of the company. The true rule, however, is that stated by Mr. Thesiger, viz., that persons who contract as agents are generally personally responsible where there is no other person who is responsible as principal."

It is true that in the *Kelner* case the principal was non-existent. The rule applied in that case would be, however, equally appropriate where the principal is incapable of acting. As Anson[48] says, "If an agent contracts on behalf of a principal who does not exist or cannot contract, he is personally liable on a contract so made."[49]

[45] L.R. 2 C.P. 174.
[46] P. 185.
[47] P. 185.
[48] Law of Contract. 16th ed. P. 424.
[49] See Pollock, Principles of Contract, 9th ed. p. 116, and Story, Law of Agency. English ed.: "§280. In the next place, persons, contracting as agents, are, nevertheless, ordinarily held responsible, where there is no other responsible principal, to whom resort can be had. Thus, for example, where a person signed a note "as guardian of A.B.." he was held to be personally liable on the note: for he could not make his ward personally liable therefor, nor his ward's assets. ... §285. Upon the same principle, where certain persons, on behalf of a parish in England, made an agreement with the plaintiff to pave the streets of the parish and to pay him therefor: it was held, that the persons so contracting were personally liable for the parishioners, as such, could not be sued therefor. *Meriel v. Wymandsold*, Hardres, R 205.

Where directors employ servants in work which is beyond the powers of the company, they ought to be held to be the employers; as employers they would be liable for all torts committed by their servants in the course of the employment. It would not be necessary to show that the undertaking itself was wrongful, as, for example, the erection of a public nuisance. The mere fact of employment in an *ultra vires* undertaking would make the directors liable for the torts committed by their servants in the course of the employment.

To hold a company liable for an *ultra vires* tort, when it is not held bound by an *ultra vires* contract, would be contrary to the established principles of the law of agency and of master and servant. It would bring the law into confusion and could only be justified on the dangerous ground that public policy demanded this anomaly. On the other hand, to hold the governing body, which has authorised the undertaking, liable, would merely require the development of a principle which has been found reasonable and just. This rule would protect shareholders, creditors, and third parties alike. Nor would it be unfair to the governing body, for, if they have exceeded their authority, it would be in accordance with public policy and sound law that they, and they alone, should be held liable.

Note.—It is only fair to point out that there are two comparatively recent cases which suggest that a statutory company or corporation may be held liable for a tort committed in the course of an *ultra vires* undertaking.

In *Ormiston* v. *Great Western Railway Co.*,[50] we find the following *dictum* by Rowlatt, J.:

> "To answer that question it is necessary to ascertain exactly what are the powers of the railway company itself, because the principle which is applicable is that they are not to be held to have impliedly given authority to their servants to do something which would be unlawful for them to do themselves. They might authorize their servants expressly, but it is for the plaintiff to prove that they have. The law does not imply against them that they have given authority to their servants to do things which they have no right to do themselves."

He found, however, that there was no express authority, and, therefore, the point did not have to be determined. The act complained of, even if done rightfully, was outside the powers of the railway company. We submit that if the directors had expressly authorised the act, they would have been acting outside the scope of their agency, and could not, therefore, have made the company liable.

[50] [1917] I.K.B. 598, 602.

It might be argued, however, that in *Campbell* v. *Paddington Corporation*[51] the question did arise. In this case the council of the Corporation authorised the erection of a stand which was held to be a public nuisance and which interfered with the plaintiff's view. The defendant was held liable in the County Court, and the judgment was affirmed by the Divisional Court. The case is not a satisfactory one, as it does not appear from the facts given whether erecting stands was within the powers of the Corporation or not. Nor is the judgment of Mr. Justice Avory particularly convincing. He said :[52]

> " This stand was erected in pursuance of a formal resolution of the borough council. To say that, because the borough council had no legal right to erect it, therefore the corporation cannot be sued, is to say that no corporation can ever be sued for any tort or wrong. The only way in which this corporation can act is by its council, and the resolution of the council is the authentic act of the corporation. If the view of the defendants were correct no company could ever be sued if the directors of the company after resolution did an act which the company by its memorandum of association had no power to do. That would be absurd. The first objection therefore fails, and the defendants are liable to be sued."

Would it be absurd to hold that a company could not be bound by a contract, formally entered into by the directors after resolution, if the company, by its memorandum of association, had no power to make it ?[53] Surely, Mr. Justice Avory's criticism applies as well to a contract as to a tort, for each is the act of the directors. It is inevitable that every argument in favour of corporate liability in tort should also apply to corporate liability in contract, for corporate liability in tort is based on the contractual relationship of principal and agent and of master and servant. The answer to the argument that " no corporation can ever be sued for any tort or wrong " if it cannot be sued for a tort committed in the course of an *ultra vires* undertaking, is that the ordinary rules of master and servant apply to a corporation, and an employer, although not liable for the torts of his servants committed outside the course of their employment, is held liable for torts committed within the course of their services.

A. L. Goodhart

[51] [1911] I.K.B. 869.
[52] At p. 875.
[53] *Ashbury Railway Carriage Co. v. Riche, supra.*

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NOTES ON RECENT CASES.

MURDER—ALLEGED "IRRESISTIBLE IMPULSE" NO DEFENCE.

R. v. *Kopsch.* (1925) C.A.C. 50.

K. was convicted of murder in the following circumstances:—K. and Beryl Thornton (K.'s aunt by marriage) had been on intimate terms. At her request K. strangled her with his neck-tie. The defence was that at the time of the killing, K. was entirely controlled by his sub-conscious mind and was therefore acting under an uncontrollable impulse. K. now applied for leave to appeal on the ground (*inter alia*) of misdirection, in that the judge at the trial had omitted to direct the jury to the effect that a person acting under an impulse which he is unable to control in consequence of mental disease is not criminally liable.

The Court of Criminal Appeal unanimously upheld the conviction. Lord Hewart C.J., laid down the law as to the defence of insanity on a criminal charge without adding anything new. And he stated emphatically that English law knew no such defence as "irresistible impulse," and he hoped it never would. The principle of *R.* v. *Coelho* (1914) 10 C.A.R. 212 was thus reaffirmed, and doubts were set at rest which, it must be admitted, have proceeded rather from text books and medical jurists than from any curial decision.

H. E. S. B.

USE OF PHOTOGRAPHS BY THE POLICE—IDENTIFICATION—EVIDENCE.

R. v. *Wainwright* (1925) 19 C.A.R. 52.

R. v. *Haslam* (1925) 19 C.A.R. 59.

These two cases involve different points of the same topic. In *R.* v. *Wainwright* W. was convicted at Sessions of warehouse breaking. Two women volunteered to the police the information that they had seen a man hanging about the *locus in quo*, and the police asked them to inspect a certain album of official photographs. The women identified W., who was duly charged. At the trial these matters were narrated by counsel for the prosecution, and the photograph album was shown to the jury. On the application for leave to appeal, the point was taken for W. that the album was wrongly admitted as evidence, inasmuch as the jury was inevitably led to conclude from the fact

of W.'s portrait being in the police album that he had been previously convicted, and his trial consequently prejudiced. The Court of Criminal Appeal quashed the conviction on this ground. Such evidence in chief by the prosecution was inadmissible, though it might be admissible in answer to certain courses taken by the defence.

In *R.* v. *Haslam*, H. was convicted of obtaining money and goods by false pretences and applied for leave to appeal on the grounds (*inter alia*) of irregular identification. It appeared that after H. had been arrested, the police showed photographs of him to various potential witnesses, who then proceeded to identify him. This was not to procure the arrest, or to trace the wrongdoer, and was held to be ample ground for quashing the conviction. *R.* v. *Kingsland* (14 C.A.R. 8) seems to have been overruled.

H. E. S. B.

COMBINATION TO PROTECT TRADE INTERESTS, WHEN ACTIONABLE—INDUCING OTHERS TO WITHDRAW FROM CONTRACTUAL RELATIONS WITH PLAINTIFF, BY MEANS OF THREATS—NO BREACH OF CONTRACT—NO INTENT TO INJURE.

Sorrell v. *Smith and others.* [1925] A.C. 700.

Plaintiff was a retail newsagent and a member of a trade union which advocated a policy of limiting the number of retail newspaper shops in each district. Defendants were the members of a committee of newspaper proprietors who stood for the opposed policy of free competition among retailers. Of the latter committee Mr. Valentine Smith, the principal defendant, was the most active member. (It is important for the sake of clarity to note that he was not a member of the firm of W. H. Smith & Sons which was involved in the dealings of which this case was the outcome.) In one of the districts over which plaintiff's union claimed to exercise control certain newcomers opened shops for the sale of newspapers and contained their supplies from a wholesale newsagent R. At the request of the union, the plaintiff, who was a customer of R.'s transferred his custom to one W. According to the finding of the jury he was induced to take this step by the request of his union, though there was some evidence that the change was materially advantageous to him. R., the deserted wholesaler, complained to the defendant committee, who determined that they must defeat the "distance limit policy" of the trade union of retailers which they considered injurious to the free sale of their newspapers. Accordingly they threatened to discontinue the supply of newspapers which W. obtained directly from them for so long as W. supplied the plaintiff, and also to cease to supply Messrs. W. H. Smith & Sons unless they would agree not to supply W. while he was supplying the plaintiff.

In an application for an injunction to restrain the defendants from interfering with plaintiff's right to continue contractual relations with

W., Russell J. found as a fact that defendants had no intention to injure plaintiff but that they had done an unlawful act in combining to interfere by threats with his right to trade as he wished. He accordingly granted the injunction prayed.

The Court of Appeal (Bankes, Warrington and Scrutton, L.JJ.) reversed the decision [1924] 1. Ch. 566, and this reversal was upheld on appeal to the House of Lords. In the House of Lords, *Mogul S.S. Co.* v. *Macgregor* [1892] A.C. 25 and *Allen* v. *Flood* [1898] A.C. 1 were applied. *Quinn* v. *Leathem* [1911] A.C. 495, was explained and distinguished. *Ware and de Freville* v. *Motor Trade Association* [1921] 3. K.B. 40 was approved and followed.

Before turning to an analysis of the principles involved in the judgment it may be valuable to examine the scope of the decision.

(1) On the facts presented to the Court there was no question of any Trade Dispute within the meaning of the Trade Disputes Act, 1906.

(2) Nor was there any breach of an existing contract, for Messrs. W. continued to supply plaintiff under an undertaking given to the Court, and were in any case at liberty to discontinue supplies after giving due notice. The case must therefore be distinguished from the class typified by *Lumley* v. *Gye* (1853) 2 E. & B. 216.

(3) The intention of the defendants was found as a fact not to have been one of spite against the plaintiff or of desire to injure him.

(4) No question of any general covenant in restraint of trade was involved.

Expressed briefly, the issue for decision was this: has a tradesman an *absolute* right to trade as he will, or is this "right" qualified by the existence of concurrent "rights" in others to exercise their own trade in modes which may interfere with his activities and chances of profit and yet afford him no cause of action?

Counsel for the plaintiff-appellant (Sir John Simon, K.C., leading) based their case on the view of Mr. Justice Russell that their client had *prima facie* a right to carry on his business in his own way so as to make any interference with such lawful trading illegal, and, should damage ensue, actionable. The respondent must therefore justify his interference. The Court of Appeal following their own decision in *Ware and de Freville* v. *Motor Trade Association* [1921] 3 K.B. 40 had held absence of spite and the fact that defendants acted to protect their own interests to be adequate justification. Counsel for appellant accordingly further submitted that even assuming that defendants' object, being to further their own interests, was not in itself unlawful, nevertheless their methods had been illegal in that they had resorted to threats and coercion; and again, that these acts if not in themselves unlawful means of attaining the desired object became so by reason of the defendants having entered into a combination. In support of this submission they cited *Quinn* v. *Leathem* [1901] A.C. 495 by which they claimed to be fortified.

Counsel for the respondents (Clauson, K.C. leading) conceded that no

man is entitled by illegal means to interfere with another's lawful trade. What then were "illegal means"?

(1) Means illegal *per se—i.e.*, such as would always be tortious whether used by an individual or combination.

(2) Means, legal in themselves if used by an individual, but illegal if used in furtherance of a tortious combination.

They submitted that a combination is innocent if its means are innocent and its motive free from spite: it is tortious if its motive is to harm someone. In *Quinn* v. *Leathem* there was a finding of an intent to injure the plaintiff.

Viscount Cave L.C., was able promptly to elucidate an ambiguity latent in the term "threats" which the appellant had embodied in his allegation. By precedent and by common sense alike it was clear that threats might be either legal or illegal according as the future event to which they had reference were lawful or unlawful. For a father to threaten his son with reasonable chastisement, or for a trader to express his intention of withdrawing his custom at a time and in circumstances when he should be legally at liberty to adopt such a course, could not conceivably be charged against them as a use of illegal means. (Cf. *Hodges* v. *Webb* [1920] 2 Ch. 70 and in *Vegelahn* v. *Guntner* (167 Mass. 92.) As had been said by Atkin L.J. in *Ware and de Freville's Case* "Any man may intimate to another that he intends to do something which he lawfully may do and it is immaterial whether the intimation is hostile and whether it is an irresistible inducement to act in a certain manner."

Accordingly respondents, who were at liberty to discontinue supplies to Messrs. W. on due notice had used no unlawful means in threatening so to discontinue, *provided that* their motive was not tortious as against the plaintiff. His Lordship was clear as to two principles to be extracted from the well-known trilogy of cases, *Mogul S.S. Co.* v. *McGregor*, *Allen* v. *Flood*, *Quinn* v. *Leathem*.

These he stated to be (A.) A combination of two or more persons to injure a man in his trade is unlawful, and, if it results in damage to him, actionable. (B.) If the real purpose of the combination is, not to injure another, but to forward or defend the trade of those who enter it, then no wrong is committed and no action will lie, though damage to another ensue; always assuming that the means adopted are not in themselves unlawful.

Finding therefore that the respondents had for their object the furtherance of their trade interests and not injury to the plaintiff, his Lordship moved the House to dismiss the appeal.

Lord Dunedin, who had made a special study of the whole question of the actionability of the acts of a non-criminal combination while acting as Chairman of the Royal Commission on Trade Disputes in 1906, directed his attention particularly to answering the question raised by *Quinn* v. *Leathem*: "Why should motive or intention be immaterial in the case of an intrinsically lawful act done by an individual—(as had been clearly held in *Allen* v. *Flood*)—and yet make all the difference

when the act is done by a combination of persons"? (See particularly the speech of Lord Bampton in [1901] A.C.)

The reason is that the essence of a conspiracy on which a civil action is founded is quasi-criminal. Therefore, as in other branches of the of crimes, *mens rea* is essential. Hence the distinction between a combination which is harmful and yet innocent, as in the *Mogul Case* and one which, being based on *mens rea* and a desire to injure, becomes conspiracy, as in *Quinn* v. *Leetham*. In *Allen* v. *Flood* on the other hand the act complained of was done by an individual, was in itself lawful, and therefore could not be a tort; and no question of criminality could arise. (Cf. *Scottish Co-operative Society* v. *Glasgow Fleshers Association*.)

In accordance with this view of the distinction between *Allen* v. *Flood* and *Quinn* v. *Leathem*, Lord Dunedin very emphatically rejected the "heresy" adopted by Russell J. from the judgment of McCardie J. in *Pratt* v. *B.M.A.* [1919] I.K.B. 260, to the effect that the element of conspiracy was "merely incidental" to *Quinn* v. *Leathem*. In effect, his Lordship noted, the appellant had contended for the acceptance of the proposition that "the right of a man to trade as he pleases implies a correlative obligation on all others to let him trade as he pleases." But it was clear that the act which interfered might be *per se* just as lawful as the act interfered with, notwithstanding the *dictum* of Lord Parker in the Privy Council in *Attorney-General of Australia* v. *Adelaide S.S. Co.* [1913] A.C. 781.

Lord Lindley in *Quinn* v. *Leathem* appreciated this point distinctly and declared that a "Right to deal with others is nothing but a 'Liberty,' the correlative of which was a general duty in everyone not to prevent the free exercise of this liberty, *except in so far as his own liberty of action might justify him.*" Another statement of the same view is to be found in *Mackenzie* v. *Iron Trades Insurance Association*. "Everyone may carry on his own business on his own lines, even though the result may be that he interferes with the business of other people."

Lord Sumner agreed that the decision in *Quinn* v. *Leathem* rested on the existence of a malicious conspiracy and thought that the present case fell within the principle of *Mogul S.S. Co.* v. *McGregor*.

Lord Buckmaster accepted Lord Dunedin's statement of the law and the House was accordingly unanimous in holding that the appeal must be dismissed with costs.

The scope of the actual decision is so restricted and the relevant portions of the judgments so conservative that little comment is called for. The judgment of Lord Dunedin, based as it was upon the view which the learned lord took of the essentials of actionable conspiracy, may be said to have defined authoritatively the principle upon which *Quinn* v. *Leathem* was decided, and to have definitely discredited the opposed body of opinion which, for several years after the date of that decision, maintained that the element of conspiracy had not been an operative factor. The difference of interpretation arose, according to Lord Dunedin, in this way. *Quinn* v. *Leathem* and *Allen* v. *Flood*

were wellnigh contemporary decisions, but the former had been decided in the King's Bench Division of Ireland before the English case of *Allen* v *Flood* had been adjudicated in the House of Lords. The Court was accordingly free to find, as it did in the first of the three findings, that the defendant had committed a tort in "maliciously procuring Quinn's customers to leave him." In this finding there was no mention of conspiracy, albeit the second finding ran "in maliciously *conspiring* to procure Quinn's customers to leave him." While Quinn's appeal was pending, the House of Lords decided in *Allen* v. *Flood* that no tort was committed by an *individual* who caused harm to another by means of a lawful act however bad his motive might be. Accordingly when *Quinn* v *Leathem* came before the House of Lords the first finding of the Irish Court was ignored since clearly no cause of action could be found there, and reliance was had solely upon the finding of malicious conspiracy. Thus it appears that the erroneous view of the decision arose from a mistaken reliance upon the first finding of the Irish Court.

Sorrell v. *Smith* actually lays down nothing beyond the following propositions, *viz.*, Two or more persons who combine to injure another in his trade *prima facie* commit a tort. If however the object of their combination is to further their own trade interests, and they adopt no unlawful methods, then, although the inevitable result of their efforts will be to injure the interests of another in proportion as their own are advanced, they commit no actionable wrong. Threats are not unlawful means of attaining their end so long as the action threatened is in itself lawful.

C. R. N. W.

MUNICIPAL CORPORATIONS ACT, 1882—ALDERMAN—CONTRACT WITH CORPORATION—SHARE OR INTEREST IN CONTRACT—COMPANY—MANAGING DIRECTOR AND SHAREHOLDER—SHARE OR INTEREST IN COMPANY—PENALTY.

Lapish v. *Braithwaite* [1925] 1 K.B. 474—40 T.L.R. 857, [1926] A.C.

This was an action brought to establish the liability of an Alderman to statutory penalties under S. 41 (1) of the Municipal Corporations Act, 1882, for having acted in his office during the currency of certain contracts between the Corporation and certain companies of which he was a shareholder and managing director.

The relevant provisions of the Municipal Corporations Act are as follows:

Section 12 (1) A person shall be disqualified for being elected and for being a councillor if and while he: . . . .

(c) Has directly or indirectly by himself or by his partner any share or interest in any contract or employment with by or on behalf of the Council.

(2) But a person shall not be so disqualified or be deemed to have any share or interest in such a contract or employment by reason only of his having any share or interest in . . . .

(e) Any railway company or any company incorporated by Act of Parliament or Royal Charter or under the Companies' Act, 1862.

Section 14 (3) A person shall not be qualified to be elected or to be an Alderman unless he is a Councillor or qualified to be a Councillor.

Section 41 (1) If any person acts in a corporate office without having made the declaration by this Act required or without being qualified at the time of making the declaration or after ceasing to be qualified or after becoming disqualified he shall for each offence be liable to a fine not exceeding £50 recoverable by action.

The appellant's case was that on July 4th, 1923, the respondent, being an Alderman of Leeds, attended a meeting of the Council of the Corporation of Leeds and voted thereat, and that at the same time he was a holder of shares in and the managing director (at a fixed salary) of four companies having current contracts with the Corporation.

In the court of first instance Bailhache J. awarded the appellant a penalty of £10 on the ground that the excepting sub-section 2 (c) of Section 12 (*supra*) forms a qualified exception affording protection to what may be termed the "bare shareholder" only, and does not extend to a shareholder who is also a managing director, even though his remuneration is fixed and does not in any way depend on the contracts he obtains for the company.

In his view the object of the word "only" was to distinguish between a person who was a shareholder and no more, and a person who, in addition to being a shareholder, had further rights in connection with the company, and he asked what more a man could be in a company than managing director.

The Court of Appeal, by a majority (Bankes and Scrutton, L.JJ., Atkin L.J. dissenting) reversed Bailhache J.'s decision and ordered judgment to be entered for the appellant.

Both the assenting Lords Justices gave very similar reasons for the conclusions they arrived at. Bankes L.J. prefaced his judgment by observing that though the legislature was obviously anxious to remove any temptations that might arise from a conflict between interest and duty, the object of the series of statutes passed between 1835 and 1882 was not to tighten up the disqualification. On the contrary, the number of exemptions was steadily increased; the reason for this being the recognition of the importance of securing the most prominent business men in the municipality for municipal office. He therefore thought that Section 12 (2) (c) when first introduced into the Act of 1882 ought not to be construed as creating any new disabilities, and that if the respondent's case did not fall within sub-section (1) it was unnecessary to consider whether sub-section (2) applied. Passing to a closer examination of the statute the learned Lord Justice came to the conclusion

that the expression "interest in a contract" did not include such an interest as a paid official of an incorporated company takes in a contract, by reason of the fact that it was part of his duty to make the contract and superintend the execution of it. McCardie J. was right in *Everitt* v. *Griffiths* ([1924] 1 K.B. 941) when he said that if the legislature had intended to disqualify the managing director and other paid officials it should have done so in more explicit language than that which appears in the Act of 1882. Since therefore the respondent was never disqualified, the exempting sub-section need not be considered.

Scrutton L.J. agreed with Bankes L.J. that it could not be thought that the relation of a salaried employee to his company was an interest, even indirect, in the contracts made by his company, within the meaning of the statute; but he went on to say that if it were an interest in the contract, *prima facie* disqualifying him, then *a fortiori* it was an interest in the company within the exempting sub-section. The word "interest" could not be construed as bearing a different meaning in the two sub-sections. Scrutton L. J. was encouraged in this view by the further consideration that in a penal action the defendant must be given the benefit of any doubt that arises. In this connection he cited the judgments of Esher M.R. and Lindley L.J. in *Tuck* v. *Priester* (19 Q.B.D. 629).

Atkin L.J. was of the opinion that besides his interest as a shareholder, which did not disqualify him, the respondent had a further interest in his capacity of managing director. As managing director it was his duty to obtain and supervise the performance of contracts, and if he succeeded in making profitable contracts he had a very reasonable expectation of receiving an increase of remuneration. His interest in this capacity therefore was both substantial, and distinct from his interest as shareholder. Having decided that the respondent fell within sub-section (1) Atkin L.J. passed on to the exempting sub-section. He was able to draw a distinction which Bankes L.J. had been unable to draw between the use of the words "share or interest" as applied to a contract and as applied to a contracting firm or corporation; and therefore held that sub-section (2) afforded the respondent no protection. He was assisted in this conclusion in that it obviously precluded, while the contrary view obstructed the principle of public policy underlying the statute.

The House of Lords (The Lord Chancellor, Lord Atkinson, Lord Buckmaster, Lord Carson and Lord Blanesburgh) unanimously upheld the judgment of the majority of the Court of Appeal.

Viscount Cave L.C. delivered a speech which in substance followed that of Bankes L.J. in the Court below. In his opinion the fact that the respondent was managing director of the four contracting companies was no ground for disqualification. A managing director is naturally concerned in negotiating and carrying out the company's contracts, but if he is paid a fixed salary he has no more interest in the contracts themselves than any other employee of the company. Such a managing director does not come within section 12 (1) and it was therefore unnecessary to discuss whether, if he did, he would be exempted by section 12 (2). The Lord Chancellor deemed it desirable to conclude his judg-

ment with some observations on the framing of the Act. Since it was was passed, commercial practice has changed considerably; and there are now many companies in which most or substantially all of the shares are held by one man who may also be principal or governing director. Such an one is *de facto* in a very different position from the bare shareholder with only a small holding in a company; and if by reason of section 12 (2) such a man can remain a member of a corporation with which his company is in contractual relations, the statute will lose much of its force and the way be paved for grave abuses to step in. In the Lord Chancellor's opinion the Legislature would do well to consider whether the section ought not to be strengthened by disqualifying persons who hold a substantial proportion of the shares in a contracting company or in some other way.

As the law stands at present it is obvious that the case was rightly decided, and also that it was the logical sequel of recent cases such as *England* v. *Inglis* ([1920] 2 K.B. 636) and *Everett* v. *Griffiths* (*supra*), but having regard to prevailing business methods and to the necessity for maintaining purity in municipal administration it seems that the Lord Chancellor's hint as to the desirability of legislative reform ought to receive earnest consideration.

Not the least interesting feature of the present case is that the House refused to ride the unruly horse of public policy and stood by the strict literal interpretation of the Act of Parliament. The famous *Salaman Case* provides a similar example of judicial good sense in high places. Whatever the intention of the legislature may have been in 1882—and a case like the present one would not have presented itself very forcibly to their minds at that date— the argument of public policy here might well cut two ways. If it is important to exclude contractors and placemen from corporations, it is equally important to place local contracts with local purveyors in the interests of economy, and to attract business men into municipal service. The true danger is not that an alderman will receive favourable treatment in *obtaining* a contract: jealous colleagues and public opinion may be trusted to watch that. The insidious thing is that, the contract once obtained, an alderman may bring his prestige to bear upon the surveyors and servants of the corporation out of public view, and procure the passing of shoddy work.

Any new bill on this topic will require all the ingenuity and sanity of the draughtsman.

M. M. W.

NEGLIGENCE—REASONABLE CARE—CONTRIBUTORY NEGLIGENCE.

Sharpe v. *Southern Railway* [1925] 2 K.B. 311.

The plaintiff was travelling by the defendants' railway to G., in a compartment with three other passengers. The train arrived in daylight, but was too long for the platform, so that the plaintiff's carriage stopped

short of it. A porter stood at the end of the platform and told the passengers to keep their seats, but the plaintiff being asleep did not hear him. On waking, the plaintiff saw that he was at G., a station he did not know well, and found the door of his carriage open and his fellow travellers gone. The plaintiff leapt up and, without looking, walked out of the carriage, fell five feet to the ground, and was injured. The plaintiff successfully sued the company for damages for negligence, but on appeal it was held that there was no evidence of negligence to go to the jury.

Counsel on both sides cited, quite fruitlessly, large numbers of "invitation to alight" cases, but each Lord Justice was insistent that, in cases of negligence, the only course was to consider the facts and apply the test of the reasonable man.

Thus Bankes L.J. at page 313, "It would be dangerous to attempt to lay down any rule of universal application as to what amounts to an implied invitation to alight, for it must depend upon the particular circumstances of each case." And he goes on to illustrate the danger by an example. If a person travels on the underground between the Temple and Victoria and knows as a fact that the platforms are level with the carriage footboards, then there is no necessity for him to look down to see where the platform is: on the other hand if a person alights at an unfamiliar country station, then his duty is to look before he steps off; "as," adds the Lord Justice, "no man can safely step into space." This is, in effect, the distinction between the principal case and that of *Glasscock* v. *London, Tilbury and Southend Railway* (1902) 18 T.L.R. 295; 19 T.L.R. 305.

Scrutton L.J. at page 318 said: "It is not very profitable to look for guidance in the decisions of Judges on the findings of juries in other cases where the facts are different."

And Atkin L.J. at page 320: "Reasonable care is always a question of special circumstances, and what would be reasonable in one set of circumstances would not necessarily be reasonable in another."

The interest of this case lies not in the decision on the special facts, but on the above remarks of the learned Lords Justices. Every case is limited by its facts for the law it lays down. The present decision reaffirms, with a very timely emphasis, the principle that in questions of negligence the only question of law is that the court must consider the standard of the reasonable man. Thus even the Lord Justice's remark that "no man can safely step into space" is not a maxim of universal application but a remark whose truth depends on the facts of the case.

In some cases the stopping of a train may imply an invitation to alight which a man may accept without special precautions; in others he must first exercise a degree of care appropriate to the particular circumstances. The proposition cannot safely be stated in narrower terms. Otherwise an ill conceived system of what may be called "precedents of fact" arises. An interesting example of how this peril worked itself out is to be found in a line of decisions in Pennsylvania where it was held *in banco* by a Court of that State that he who alights from a street car is

under a duty to "stop, look and listen," and that failure in any one of these respects *ipso facto* constitutes negligence. This artificial stereotyping of the legal requirements of human conduct proved to be of the utmost inconvenience and to entail absurd results in law. The Court made into an absolute test what was essentially no more than a factor, although an important and frequently decisive factor, of the total evidence which must be considered.

It is interesting to note that where companies are under a statutory duty to give a warning, this warning need only be such as would reach a reasonable man. "It is only necessary that the warning should be such as ought to be apprehended by a person of ordinary faculties in a reasonably sound, active, and alert condition," *per* Lord Atkinson in *Grand Trunk Railway* v. *McAlpine* [1913] A.C. 838. P.C.

G. R. U.

Domicil the Test of Jurisdiction in Divorce—Exception—Treaty of Lausanne, 1924.

Seager v. *Seager* [1925] P. 105.

According to the territorial principle, "every State is deemed to possess an exclusive power of making law and an exclusive right of jurisdiction within its own territory." Logically this would extend the laws and jurisdiction of a State to all persons found within its territory, including domiciled aliens who owe it temporary allegiance. Nearly every country, however, recognises the difference between political status and civil status, and in the case of a domiciled alien it is only as regards the latter that the territorial principle applies; thus for all cases which involve his capacity to marry, make contracts, alienate movables, etc., he must submit to the local jurisdiction.

The territorial principle is subject to many exceptions; these are grouped under the name of the "principle of exterritoriality," but are in reality merely "immunities which attach to certain persons on grounds of convenience or comity," as the result partly of treaties, and partly of custom. In the case of non-Christian countries, European Governments from comparatively early times have found it necessary, owing to differences in religion and culture, to withdraw their subjects from local jurisdiction; thus British subjects in Turkey are exempt from local jurisdiction in questions of marriage and divorce; for to have done otherwise would have been obviously unsuitable owing to the fundamental difference in Turkish marriage laws.

In the case of Turkey, these exceptions were originally founded on the capitulations, treaties made by European Powers with the Sultan; thus, when in 1856, Turkey was formally admitted to the "public law and system of Europe," she was not, in practice, on the same footing as the other members of the family of nations. As a result of the above-mentioned treaties jurisdiction was conferred on the consuls of the

respective Powers whose interests they represented. Previous to the late war the British system of consular jurisdiction was regulated by an Order in Council of 1873 and various supplementary Orders. Roughly, the system was as follows: All British subjects to register themselves at the Consulate; a limited civil and criminal jurisdiction (original and appellate) vested in the Supreme Consular Court, sitting at Constantinople, with a right of appeal to the Privy Council; the law to be administered to be for the most part English law. The Supreme Consular Court was brought into existence again after the war and continued to function until the Treaty of Lausanne, 1924.

In *Seager* v. *Seager*, the petitioner, the wife of a British subject domiciled in Turkey, had obtained a decree *nisi* for a divorce, on the ground of her husband's adultery, in the Supreme Consular Court [His Britannic Majesty's Supreme Court for the Dominion of the Sublime Porte (Matrimonial Jurisdiction)]. The Court ceased to exist on the ratification of the Treaty of Lausanne, three days after the date of the Order, which, therefore, could not be made absolute.

Motion was now made in the P.D. and A. Division to have the decree made absolute. Counsel cited the following: (1) Art. 1a of the Convention between England and Turkey (dated July 24, 1923, the day on which the Treaty of Peace was signed) whereby it was agreed that in matters of personal status (*i.e.*, all questions relating, *inter alia*, to divorce), as regards non-Moslem nationals of Great Britain in Turkey, the national tribunal or other competent national authorities, established in the country of which the party whose personal status was in question was a national, should alone have jurisdiction; (2) The Treaty of Peace (Turkey) Act, 1924, which empowered the Crown to make such Orders in Council as were necessary to confer jurisdiction on Courts within His Majesty's Dominions; and (3) Art. 2 of Statutory Rules and Orders under Peace Treaties, the Treaty of Peace (Turkey) Order No. 820, which appointed that the Supreme Court of Judicature in England should be the Court, and that the law to be applied was the law in force in England, but it must be applied only to British subjects domiciled in Turkey. The Hon. V. Russell, for the King's Proctor, made no objection. Swift J., directed the case to be listed for decree absolute on the first motion day, the facts to be recited in the decree.

Thus, for matters of personal status, not only is English law applied, but the Court which applies that law is situated, not in Turkey, but in England. D. W. W.

ANIMUS CONTRAHENDI—AGREEMENT BINDING IN HONOUR—OUSTING THE JURISDICTION—REPUGNANCY.

Rose and Frank Company v. *J. R. Crompton, Ltd., and others et e contra.* [1923] 2 K.B. 261 C.A. [1925] A.C. 445.

This case raises an interesting if somewhat academic point as to the legal incidents of a written agreement which was expressed to be " an honourable pledge " only.

Prior to 1913 the respondent English company by successive yearly arrangements constituted the appellant American firm the sole agents for sale in the U.S. and Canada of certain goods supplied by the respondent company, but manufactured by another English company. In 1913 both English companies expressed their willingness to continue the previous understanding, with modifications, for a period of three years determinable at six months' notice. A document was drawn up setting out the terms and stating: " This arrangement is not entered into, nor is this memorandum written, as a formal or legal agreement, and shall not be subject to legal jurisdiction in the Law Courts either of the United States or England, but it is only a definite . . . . record of the purpose . . . . of the three partners concerned, to which they honourably pledge themselves . . . . " Further extensions of three years were eventually agreed. Disputes arose and the English companies determined the arrangement without notice, but not before the appellant firm had given and the respondent company had accepted certain orders for goods. The appellant firm sued for breach of the contract (alleged to be contained in the document of 1913) and for non-delivery of goods. The Court of Appeal unanimously held, reversing Bailhache J., that the document of 1913 did not constitute a binding contract and that the action would not lie; and further (*per* Bankes and Scrutton, L.JJ., Atkin L.J., dissenting) that the orders and the acceptance thereof were alike referable to the document, and that the non-fulfilment of them did not constitute a breach of contract.

The House of Lords (Lords Birkenhead, Atkinson, Sumner, Buckmaster and Phillimore) came to conclusions differing in some respects from those of the Court of Appeal, and held: (i) that the arrangement of 1913 was not a legally binding contract (ii) that all agreements previous to the arrangement of 1913 were determined by mutual consent at that time (iii) that the orders given and accepted constituted contracts of sale independently of the documents of 1913.

As to (i) the House unanimously agreed with the Court of Appeal. It is well established law that for a binding contract to arise the parties must intend to enter into legal relationship, which, in the present case, was expressly negatived by the " honourable pledge " clause. It was ingeniously but unavailingly argued that the agreement of 1913 provided for a legal relationship in all its terms, save the " honourable pledge " clause, and that the latter was void for repugnancy to the whole instrument. It is manifest, however, that so far from being repugnant to the whole, it governed the whole, and made it into a mere gentleman's agreement. The question of repugnancy does not strictly arise when the question is, not the degree or amount of legal right given by an instrument, but whether there is *any legal* right at all.

As to (ii) the House held that any previously existing legal relationship between the parties was determined by mutual consent in 1913 (though not, of course, by virtue of the unenforceable instrument of that date), and the prior legal contracts, if any, did not revive in support of the appellants' claim.

As to (iii) it was held that independently of the unenforceable agreement of 1913 and, indeed, independently of any other agreement, each transaction was of itself a contract which was legally binding.

This case illustrates well how justice may be served without distorting the law.

R. A. W.

GAMING—SPECULATIVE TRANSACTIONS ON THE METAL EXCHANGE—PUBLIC POLICY—GAMING ACT 1845. S. 18. GAMING ACT 1892. S.1.

Barnett v. *Sanker.* 41 T.L.R. 660.

In January, 1924, the defendant, a clerk to Messrs. Sim & Coventry, metal merchants, suggested to the plaintiff that they should jointly make purchases on the Metal Exchange, with a view to making a profit. The transactions were to be in the nature of "agreements to pay differences," that is to say, the subject matter (the metals) was not to be taken up, but, in fact, covering transactions were made with third parties, in regard to each dealing. After the end of July the plaintiff determined his relation with the defendant, although he allowed the defendant to make purchases in the name of the plaintiff's firm till October. Subsequently the plaintiff paid £209 7s. 11d. to Messrs. Sim & Coventry. This sum represented the balance due on a purchase of goods by the defendant, trading under the name of the plaintiff's firm. The plaintiff sued to recover this sum.

The defendant pleaded :—

(1) That the agreements were wagering contracts within the Gaming Act 1845, S.18, and, therefore, unenforceable by reason of the Gaming Act 1892, S.1.

(2) That by the rules of the Metal Exchange, a clerk to a member might not deal as a principal, and, therefore the contracts were void as being contrary public policy.

As to (1) McCardie, J., said that the contracts were speculative, in that the plaintiff knew that he had no intention of taking up or delivering the metals as stated in the contracts. But the test of gaming was whether or not the parties meant to create a legally enforceable bargain between themselves in regard to the traffic in the goods, and a legal right to demand payment accordingly. On the present facts, such a right clearly existed, and since each party to those several contracts had a reciprocal right, the contracts were not wagers.

In *Thacker* v. *Hardy*, 4 Q.B.D. 685, a broker sued for money owing over speculations on the Stock Exchange, which the defendant in that case had asked him to make. The stock was not taken up, and the defence of wagering was raised. It was held that such contracts were not wagers. Again, in *Universal Stock Exchange* v. *Strachan* [1896] A.C. 166, it was held that if in such transactions securities were

deposited by one party, they were not "to abide the event," and were recoverable by action. In the present case the reasoning was similar to that in *Cooper* v. *Stubbs* [1925] 2 K.B. 753. [*See next case noted*, ED.].

As to (2) As to the question of public policy, the learned judge said that the plaintiff did not know the rules of the Metal Exchange. Nor did the principals of the defendant's firm know that the defendant had any interest as purchaser in the contracts to which they were the selling parties; if they had known the facts, they would not have taken up the contracts in question. The plaintiff must have known that the defendant was not acting properly in relation to his employers, but the defendant did not appear to have given away any of his principal's secrets. The most that could be said, therefore, was that there had been a breach of moral propriety, which was not a sufficient ground for avoiding the contracts, as being contrary to public policy.

R. G. D.

INCOME TAX—GAMBLING—POWER OF INCOME TAX COMMISSIONERS—INCOME TAX ACT 1918.

Cooper (*Inspector of Taxes*) v. *Stubbs*. [1925] 2 K.B. 753.

This was an appeal from a decision of Rowlatt J., reversing a finding of the Income Tax Commissioners. The appellant, a cotton broker, had been charged Income Tax on private speculations in cotton, known as "future delivery contracts," in which his firm had no interest. The Income Tax Commissioners had found:—

(a) That the transactions were gambling transactions, and so the gains were not assessable under Schedule D. Case VI Income Tax Act 1918.

(b) That the transactions were not so habitual as to constitute a trade, and therefore, the gains were not assessable under Schedule D. Case I Income Tax Act 1918.

As to (a) the essence of "future delivery contracts" is that the speculator agrees to buy, or sell, goods, or stock at some future date, and in the interval arranges covering transactions with a third party. If the original contract expressly provides that the goods or shares are not to be taken up, then the contract is a wager under *Grizewood* v. *Blane* (11 C.B. 538). But if there are separate contracts, the one to buy the goods, and the other a resale to a third party, only leaving differences to be paid, the case is quite different. In *Thacker* v. *Hardy*, 4 Q.B.D. 685, Bramwell L.J., said: "There was nothing in the transaction from which the jobber could tell whether the transaction was *bona fide*, that is for the purposes of investment, or whether it was a mere speculation. . . . The bargain was real, and meant what

it purported to be, although when the time should come for delivery, another bargain might be substituted for the original one." And in *Forget* v. *Ostigny* [1895] A.C. 318, Lord Halsbury L.C., said: "To enter into transactions with such an object is sometimes called 'Gambling on the Stock Exchange.' A contract cannot properly be so described because it is entered into in furtherance of a speculation. It is a legitimate commercial transaction to buy a commodity in the expectation that it will rise in value, and with the intention of realizing a profit on its resale."

The Court of Appeal decided that the contracts were not gambling contracts on the ground that they gave rise to real rights and obligations. Pollock M.R., said: "The purpose for which he made them did not alter the character or nature of the contracts that he did make." Atkin L.J., said: "It takes two parties to make a bet, and if you consider one party alone you do not sufficiently consider all the elements of the case . . . . unless the other party is also betting there can be no bet." Either party could have sued to implement, and, therefore, the contracts were valid, not gambling, transactions.

As to (b) On the question whether a trade was being carried on, Pollock M.R., held that the Commissioners had based their finding on insufficient evidence. "These were a number of real contracts spread over a number of years, and conducted with the knowledge and experience of the Appellant's ordinary business. Therefore, the tests applied by the Commissioners were not sound in law." The other two judges reserved their own opinion as to the merits of the finding, but refused to overrule it on the ground that the question was one of degree and so of fact. In *Currie* v. *Inland Revenue Commissioners* [1921] 2 K.B. 332, Scrutton L.J., said: "All these cases, which involve questions of degree, seem to me to be eminently questions of fact, which the Legislature has thought fit to entrust to the Commissioners."

The majority of the Court decided therefore in favour, not of the actual finding of the Commissioners, but of their power to find. Warrington L.J., said: "The Court of Appeal ought to be very careful not . . . . to interfere with the decision of the Commissioners on a question of fact, except in a very clear case, where, either the Commissioners have come to their conclusion without evidence which should support it . . . . or have misdirected themselves in point of Law." The question of habitualness was clearly evidence, and so on this point the finding of the Commissioners could not be disturbed.

R. G. D.

CONTRACT—CONSTRUCTION—EXCEPTION OF LOSS BY FIRE—FIRE CAUSED BY NEGLIGENCE OF CARRIERS' SERVANTS.

Turner v. *Civil Service Supply Association, Ltd.* [1926] 1 K.B. 50

Fagan v. *Green and Edwards, Ltd.* [1926] 1 K.B. 102.

These two cases may be made the subject matter of an interesting footnote on the maxim *ut res magis valeat quam pereat*, as applied in construing a written agreement. The facts of the cases are very similar; in both there was a contract between furniture removers and private persons for the removal of goods by road, and in each case a condition was inserted in the contract expressly providing that the defendants would not be responsible for loss or damage caused by fire.

If the defendants had been common carriers this exception clause would have been interpreted so as to exclude liability for fire caused by their negligence, as is shown by the case of *Price and Co.* v. *Union Lighterage Co.* [1904] 1 K.B. 412, where Lord Alverstone C.J., says: ". . . . Since the case of *Phillips* v. *Clark* (1857) 2 C.B. (N.S.) 156; 26 L.J. (C.P.) 168, it has been settled that when a clause in such a contract as this is capable of two constructions, one of which will make it applicable where there is no negligence on the part of the carrier or his servants, and the other will make it applicable where there is such negligence, it requires special words to make the clause cover non-liability in case of negligence." In the present case, however, the defendants were furniture removers, and as such not under the liability of common carriers (*Scaife* v. *Tarrant* (1875) 44 L.J., Ex (36), and, therefore, they were not in any sense insurers, and were only liable for negligence. Consequently, if the exemption clause were not construed to refer to negligence it could have no possible meaning or purpose, the defendants being, in any case, free from liability for accidental loss because of the lesser liability of the ordinary carrier.

The only case which, at first sight, seems difficult to reconcile with the decisions in the present cases is that of *In re Polemis and Furness, Withy and Co.*, where it was held by the Court of Appeal that an exception of "fire" in a charter party did not protect the charterers against loss by fire caused by the negligence of their servants, there being no clear words excluding liability for negligence. The charterers in that case were not common carriers. It was, therefore, urged in *Fagan* v. *Green and Edwards* that the defendants were in the same position. Horridge J., in giving judgment, however, explained that the ground on which *In re Polemis* was decided was the exception clause appearing in most charter parties, namely, "always mutually excepted," meaning that the clause containing the exceptions operates for the benefit of both shipowner and charterer, and because the former was a common carrier, the mutual interpretation of the clause operated to make the charterers responsible as common carriers also.

As regards the relationship between the liability of carriers of goods and that of carriers of persons, see Leake on Contracts, 7th ed., pp. 514 and 515 and cases there cited. "An express stipulation that the goods shall be carried 'at the owner's risk' excepts the liability of the carrier as insurer; but not his liability for delay or negligence in the carriage and delivery of the goods." "A carrier of passengers is liable only for negligence and not as an insurer of their safety; and a stipulation that the passenger shall travel 'at his own risk' excepts the liability for negligence."

With the vast increase in motor transport in recent years the question of the liability of furniture removers who are not common carriers is becoming an important one. In *Turner* v. *Civil Service Supply Association, Ltd.*, Sankey J., said: "I do not invite an appeal because I know what the expense of litigation is, but if the case should be taken to the Court of Appeal, and the Court of Appeal should reverse my decision, nobody would be more glad than myself; but, unfortunately, I have to do the best I can as a judge and not as an individual, and, with great regret, I must give judgment for the defendants." Perhaps this is a hint that legislation would be desirable.

F. K. E.

CONTRACT—SALE OF GOODS—SALE OF UNDIVIDED PART OF GOODS DEPOSITED IN WAREHOUSE—PASSING OF PROPERTY—REFUSAL OF WAREHOUSEMEN TO DELIVER PURCHASED GOODS TO BUYER—RIGHT OF BUYER TO DAMAGES FOR CONVERSION—CUSTOM—AMERICAN LAW DISTINGUISHED.

Laurie and Morewood v. *John Dudin and Sons.*
[1925] 2 K.B. 383; 30 Com. Cas. 280.

The important facts of this case are the following: In February, 1925, a firm, Alcock and Sons, had a quantity of maize in bulk in the defendants' warehouse. Alcock and Sons sold 200 quarters thereof to one Wilkes, and Wilkes resold to the plainiffs. At the time, Wilkes was indebted to the plaintiffs and was unable to pay them, and the plaintiffs bought the maize from him with the intention of setting off the price against the debt. Wilkes gave the plaintiffs a delivery order directing the defendants to deliver the maize to the plaintiffs, but as Wilkes had failed to pay Alcock, Alcock had, in the meantime, ordered the defendants not to allow any of his maize to leave the warehouse. The defendants, therefore, refused to deliver the 200 quarters to the plaintiffs, who now sued for damages for detinue and conversion. Wilkes had, meanwhile, become insolvent. Nothing had been done to appropriate any particular 200 quarters out of the bulk of the maize at the warehouse.

The plaintiffs advanced three main points: (a) That 200 quarters of maize were their property because the title therein passed when they received the delivery order which had been accepted by the Defendants without objection; and that they thereupon became owners in common of the whole mass of grain, with a right to give instructions for delivery of the proportion covered by their contract.

(b) That the Defendants and Messrs. Alcock were estopped from alleging that the plaintiffs were not the owners of 200 quarters.

(c) That by reason of a custom among grain merchants they were entitled to recover.

The chief point of interest lies in Sankey J.'s, treatment of the doctrine of estoppel under point (b). Points (c) and (a) can be dealt with shortly.

As to ground (c), the plaintiffs alleged a custom under which after a lapse of 24 hours from the receipt of delivery order by the defendants without objection taken, the plaintiffs in those circumstances would be entitled to assume that the defendants would hold and deliver the particular quantity to the plaintiffs. But the custom was not proved by the evidence of many expert witnesses, and Sankey J. dismissed it as not established in fact.

As to point (a), this seems to have been taken as the result of a mistaken foisting of American on to English law. In Federal law it would seem to be a sound proposition that no separation of goods from the bulk, or other act done to earmark a particular lot, is necessary in order that title in that lot may pass. The only English case affirming this doctrine is *Whitehouse* v. *Frost* (1810) 12 East, 614, which, says Sankey J., "has frequently been disapproved . . . and may be treated as no authority here." The true test in the principal case is—has an act of appropriation or separation been proved? If not, the purchaser is not entitled to sue for conversion, at least here, where the power of appropriation or separation is in the hands of a third party—*Sterns, Ltd.* v. *Vickers* [1923] 1 K.B. 78 per Scrutton L.J., at p. 84.

As to ground (b) the doctrine of estoppel may be regarded in a positive aspect, as where some act is done which causes the doctrine to come into operation, and in a negative aspect, as where some act is not done which ought to be done. To illustrate the positive side five cases were cited and all five distinguished from the present case on the ground that in all of them the defendants had actually done something upon which the plaintiff relied as being a part of the transaction, and therefore the defendants were estopped from alleging that the condition of affairs was different from that in which they had led the plaintiff to believe. These five cases were :—

Knights v. *Wiffen* (1870) L.R. 5 Q.B. 600, where the defendant had definitely recognised the plaintiff as entitled to possession of some grain, the subject matter of the dispute.

Harman v. *Anderson* (1809) 2 Camp. 242, where the defendants had in their books transferred the whole of the goods in question to the name of the bankrupt, and actually debited him with warehouse rent,

and Lord Ellenborough held that the right to stop in transit was gone.

Stanard v. *Dunkin* (1809) 2 Camp. 344, where the defendants gave a written acknowledgment that they held malt on the plaintiff's account, and the plaintiff thereupon advanced £7,500 to the defendant.

Gillett v. *Hill* (1834) 2 C. & M. 530, where the delivery order was for 20 sacks specifically and five were in fact delivered.

Woodley v. *Coventry* (1863) 2 H. & C. 164, where the plaintiff expressly asked if the delivery order was correct, and relying on an affirmative answer, paid part of the price.

So much for the positive aspect. Sankey J. added that the doctrine of estoppel could be brought into play equally by not doing something which ought in fact to be done. Had the present plaintiffs proved the custom they alleged, then when 24 hours had elapsed after receipt by the defendants of the delivery note without any action being taken by the defendants, they might be entitled to assume that the doctrine of estoppel would operate in their favour. But no such custom was proved. There was no obligation upon the defendants to acknowledge receipt; and the plaintiffs would have no right to the goods until they received a delivery warrant from the defendants. In the result, Sankey J. found for the defendants. An instructive analysis of the operation of estoppel in regard to transfer of possesion.

K. G. J.

CONTRACT—SALE OF GOODS—PASSING OF PROPERTY—CONTRARY INTENTION UNDER SECTION 18 OF SALE OF GOODS ACT, 1893.

Kempler v. *Bravingtons* [1925] 41 T.L.R. 519.

This case raises an interesting point of interpretation of terms in a contract, almost on all fours with *Weiner* v. *Gill* [1906] 2 K.B. 574.

A delivered jewels to B on a "sale or return note" of which the revelant parts were as follows :—"To B— on sale or return from A . . . I reserve the right to charge any of the above-mentioned goods which shall not have been returned within seven days. *The goods specified above remain my property until charged by me,* you in the meantime being responsible for loss or damage. All uninvoiced goods to be returned on demand, (signed) A." B sold some of the jewels to C and failed to account for them to A, and was subsequently convicted of larceny. A sued C for the jewels or their value. C pleaded that the property had passed under Rule 4, Section 18 of the Sale of Goods Act, 1893, in that B had acted as A's agent, and in selling the jewels to C he had adopted the transaction within the meaning of the Act. A's ground of action was that a "different intention" as required by Section 18 was here expressed in the words italicised, and that the property therefore had not passed.

It was proved in evidence that on a previous occasion B had acted as A's agent, and had received commission from A. But McKinnon J. had little difficulty in deciding in favour of A. He held that B was not A's agent in any sense; and that the words italicised amounted to a "different intention" under Section 18, and that the property therefore had not passed.

This further case on construction of terms and conditions was confirmed by the Court of Appeal (Bankes, Scrutton and Sargent, L.JJ.)

K. G. J.

SALE OF GOODS—CONVERSION—TITLE TO GOODS—OWNER PRECLUDED FROM SETTING UP TITLE—RAILWAY CONSIGNMENT NOTES—BONA FIDE PURCHASER.

Commonwealth Trust, Ltd. v. *Akotey* [1926] A.C. 72.

This was an interesting appeal to the Judicial Committee from a judgment of the Full Court of the Gold Coast Colony.

The respondent, Akotey, a cocoa-grower, consigned by railway 1,050 bags of cocoa to Laing to whom he had previously sold cocoa. Before a difference as to price had been settled Laing sold the cocoa to the appellants, the Commonwealth Trust, Ltd., and handed the railway consignment notes, which had been forwarded to him by Akotey, to the appellants' agent, who reconsigned the cocoa to the appellants. The appellants in entire good faith took delivery of, and paid Laing for, the cocoa. Akotey sued the Commonwealth Trust for damages for conversion and the Colonial Court entered judgment for £6,375 and costs.

The appeal was heard by Lords Atkinson, Parmoor and Shaw, the last-mentioned delivering the judgment of the Court. It was held that no contract of sale had been completed between Akotey and Laing when the latter transferred the goods to the appellants, but although the property in the cocoa had not passed from the respondent, yet he had so acted that he estopped himself from setting up his title in answer to the claim of the appellants. The Factors Acts were not invoked as Laing was not a mercantile agent. Their Lordships were of the opinion that it was a plain case for the application of the principle of Ashurst J.'s *dictum* in *Lickbarrow* v. *Mason* (2 T.R. 63) "that wherever one of two innocent persons must suffer by the acts of a third he who has enabled such third person to occasion the loss must sustain it."

"To permit goods," said Lord Shaw, "to go into the possession of another with all the insignia of possession thereof and of apparent title and to leave it open to go behind that possession so given and accompanied, and upset a purchase of goods made for full value and in good faith would bring confusion into mercantile transactions and would be inconsistent with the law and the principles so frequently affirmed following *Lickbarrow* v. *Mason*."

To deal adequately with the case and the *dictum* of Ashurst J. is impossible within the limits of a note. The *dictum* has been much criticised and definitely limited in a long list of cases extending down to *Macmillan* v. *Joint Stock Bank*, 1918. A perusal of these cases has led to the raising of a large number of interesting and important issues in the law of estoppel and especially in that section of it known as "estoppel by negligence." It is hoped to deal with these and other questions arising out of Lord Shaw's judgment in a separate article in the near future.

D. R. S. D.

Sale of Goods—Checking Weight—Absence of Condition—Precedent—Passing of Property—Purchase in Good Faith.

Nanka Bruce v. *Commonwealth Trust, Ltd.* [1926] A.C. 77.

This was an appeal to the Privy Council from the full court of the Gold Coast Colony against their refusal to award damages for conversion of 160 bags of cocoa. The appellant made a general arrangement with one Laing to send him cocoa at a fixed price, which he was to resell to other merchants. It was recognised that the latter, by weighing the cocoa, would ascertain the quantity sent to Laing and the sum due from him. The appellant sent 60 bags of cocoa by rail, under a consignment note in Laing's favour. Having transferred the document of title to the respondents, who took delivery of the bags in good faith, and credited Laing with the price.

The appellants argued that Laing never had any title to the goods until after they had been weighed and checked.

The court applied *Cundy* v. *Lindsay* (1878) 3 A.C. 459. The weighing of the cocoa was not a condition precedent to a sale, "It was merely to see whether the goods fitted the weights as represented. To make such a condition, a clear contract to that effect is required." Here Laing held under a *de facto* contract, voidable perhaps, but existing. He could, therefore, pass the property in the cocoa to the respondents, who took for value and without any notice of a defect in Laing's title. They did not, therefore, convert the goods, and the appeal was dismissed. The court also suggested that the appellant might perhaps fail on another ground; that even if he had not sold to Laing, by putting him in possession with apparent authority to sell, the appellant was estopped from denying that authority, as in the case of *Commonwealth Trust, Ltd.* v. *Akotey* [1926] A.C. 72 (*supra*).

Cundy v. *Lindsay* is the well-known case in which the transferor was mistaken as to the identity of the transferee. Lord Cairns, who made an abstract of the circumstances in which property in goods passes, said: "By the law of our country the purchaser of a chattel takes the chattel,

as a general rule, subject to what may turn out to be certain infirmities in the title. . . . If it turns out that the chattel has been stolen by the person who professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it by a *de facto* contract, that is to say a contract which purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even though it should afterwards appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it, and to set it aside . . . because these circumstances will not be allowed to interfere with the title for valuable consideration obtained by some third party during the interval while the contract remained unreduced. The question, therefore is, was there any contract which, with regard to the goods in question in this case had passed the property in the goods from Messrs. Lindsay to Alfred Blenkarn?" The court held the property did not pass, there being no such contract.

The case of *Simmons* v. *Swift* (1826) 5 B. & C. 857 exemplifies a contract under which property did not pass. Here the plaintiff sold the defendant a stack of oak bark at £9 5s. 0d. a ton. Part of the stack was weighed and taken away by the defendant, but the rest was damaged by flood. "The question is," said Bailey J., "was the property in the bark vested in the defendant, so as to throw all risks upon him? I think it was not. If anything remains to be done on the part of the seller, and until that is done, the property is not changed. . . The bargain here did not specify the mode in which the weight was to be ascertained, but it was necessary that it should be ascertained before the price could be calculated, and the concurrence of the seller in the act of weighing was necessary. Until the act of weighing was done the bark remained at the plaintiff's risk."

R. B. T. K.

LIMITATION OF ACTION—PUBLIC AUTHORITIES PROTECTION ACT, 1893—ACTION FOR NEGLIGENCE — WHETHER TIME RUNS FROM NEGLIGENT ACT OR FROM RESULTING DAMAGE.

Freeborn v. *Leeming* [1926] 1 K.B. 160.

and

Huyton and Roby Gas Company v. *Liverpool Corporation* [1926] 1 K.B. 146.

These two cases, involving personal injuries and damage to property respectively, both came before the Court of Appeal. Both involved interpretation of the Public Authorities Protection Act, 1893, Section 1, which reads as follows:—"Where . . . any action, prosecution or pro-

ceeding is commenced . . . against any person for any act done in pursuance or execution . . . of any Act of Parliament, or any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty or authority . . . (a) the action shall not lie or be instituted unless it is commenced within six months next after the act, neglect or default complained of, or, in the case of a *continuance of the injury or damage*, within six months next after the ceasing thereof." Both cases required interpretation of the words italicised.

Freeborn v. *Leeming* may be dealt with first. The facts so far as material were as follows:—The plaintiff was admitted to a workhouse hospital under the charge of the defendant. He was suffering from a dislocation which the defendant failed to diagnose: in failing to discover the nature of the plaintiff's injury the defendant was negligent. Plaintiff was discharged uncured, and went to another doctor, who found that an operation was necessary, the unavoidable result of which was that the plaintiff's left leg was permanently shortened. It was not suggested that had the plaintiff brought this action within six months he could not have recovered. But he commenced the action more than six months after his discharge from the defendant's care. It was not disputed that the defendant came under the section of the Act cited above.

The Court were bound by the decision in *Carey* v. *Bermondsey Borough Council* (67 J.P. 111, 447), where it was held that the words "continuance of the injury or damage" in Section 1 of the Act of 1893 meant the continuance of *the act or omission which caused the damage*. The question in the present case was whether the act (or omission as it was in this case) of the defendant continued after the discharge of the plaintiff from his care. Did the omission in fact continue so long as there was a detrimental physical state in the plaintiff which would not have been there but for the defendant's negligence? The Court (Bankes, Scrutton and Atkin L.JJ.) had no difficulty in holding that the omission did *not* continue beyond the time of the plaintiff's discharge from the defendant's care: for as soon as the plaintiff was discharged the defendant ceased to be able to remedy the defect caused by his negligence. As soon as the possibility of doing again well what had been done negligently was removed, the act (or omission) ceased, and could not be deemed "continuous," as required by the section quoted above, after that time.

In the case of *Huyton and Roby Gas Co.* v. *Liverpool Corporation* the facts were as follows:—The defendants, acting under special statutory powers, laid a water main in a street in which there were already gas pipes belonging to the plaintiffs. The work of laying the main was completed in September, 1923. In filling in the trench in which the main was laid, the defendants failed to ram down the earth sufficiently, so that the plaintiffs' gas pipes were not properly supported; and in consequence of gradual subsidence, several fractures in the plaintiffs' pipes occurred between December, 1923, and September, 1924. The plaintiffs commenced in December, 1924, this action for damage suffered in con-

sequence of these fractures. The Court (composed as above) held that there was here an omission which continued after the filling up of the trench; the omission continued in fact so long as there was a legal opportunity for the defendants to open up the trench and do in a proper manner what they had done negligently. The defendant's counsel argued that there could be no continuance of a breach of duty at a time when the power to remedy the misfeasance had ceased. He submitted that once the trench was filled in, the defendants could not again open it up without committing a breach of law. The Court agreed that there could be no continuance of the breach of duty after the power to remedy the misfeasance had ceased. But they were not satisfied that the defendants could not have remedied the misfeasance. They could have applied for, and would have been given, permission to remedy the breach of duty.

This case seems complicated on reading the report. But it resolves itself into simple principles, which if once understood, make the problem (and any others like it) easy of solution. In this case there were done by the defendants two acts—the one positive and the other negative. The positive act was the actual filling in of the trench. The negative act was the failure to remedy the defect which remained after filling in the trench negligently. That the power to remedy the defect existed the Court had no doubt.

So, for the purposes at least of interpretation of this statute, it may be said that a negative act continues so long as there is a duty to act positively, and (*Freeborn* v. *Leeming*) no longer. A *continuous* negative act there undoubtedly can be. And the distinction between the two cases here discussed is that in the former the negative act ceased because the duty to act positively ceased (on the plaintiff's discharge), while in the latter, the negative act continued as long as the duty to act positively (*i.e.*, by remedying the defect) continued.

In his judgment Atkin L.J. suggested that there could be a continuous *positive* act as well as a continuous *negative* act. But this is very doubtful. The most satisfactory definition of an "an act" is that given by Holmes (Common Law, p. 91) "An act is always a voluntary muscular contraction, and nothing else. The chain of physical sequences which it sets in motion . . . is no part of it." This idea is supported by the definitions of Austin and Pollock. It is submitted that any positive act which might appear to be continuous on closer analysis will resolve itself into a series of finite and completed acts. To run a hundred yards might be thought to be a continuous positive act. But it is really a series of finite acts. Suppose the hundred yards covered in a hundred days, and the idea becomes plainer. The act of covering the hundred yards can no longer be called continuous. And thus all positive acts which might seem to be continuous are resolvable into a series of completed acts, be they of longer or shorter duration. Atkin L.J. gave as examples in support of his suggestion continuous trespass to land, and imprisonment of the person. But surely these resolve themselves: the first into the positive finite act of entering upon the land, and the continuous negative

act of failing to go off the land while the duty so to do continues; the second into the positive finite act of seizing the person, and the continuous negative act of failing to liberate the person, which negative act continues so long as the duty to act positively (by liberating the person) continues.

If these two ideas are accepted, viz., that a positive act cannot be continuous but that a negative act can and will continue as long as a duty to act positively continues, then such cases as the two here set out resolve themselves into little else than questions of fact, as to whether the negative act did in fact continue.

K. G. J.

ABSOLUTE GIFT BY WILL—CONDITION SUBSEQUENT IN CODICIL—RESTRAINT OF MARRIAGE WITH PARTICULAR PERSONS—VALIDITY.

In re Bathe [1925] Ch. 377.

A testator bequeathed certain personalty and devised a freehold house in favour of his son, the plaintiff, on his attaining twenty-five, and bequeathed the residue of his estate to the Public Trustee on certain trusts. By a first codicil made on the same day as the will, he directed that if his son should marry a certain lady, D— B—, he should forfeit all his interest under the will, and that the same should then devolve according to the trusts of the residue as if his son had died immediately after the testator and had left no issue. By a second codicil the condition was extended to restrain marriage with a second lady E— F—. The testator died in 1918 and in 1921 the plaintiff married his present wife, who was not one of the ladies mentioned in the codicils. In 1924 he attained twenty-five and became entitled in possession to the real and personal property.

Both the ladies mentioned in the codicils were living and one had married and her husband was alive. Neither had been described quite accurately.

On a summons by plaintiff asking whether the provisions for forfeiture were valid, Eve J. held that the provisions of the codicils were not so uncertain as to be void, since the ladies, though their Christian names had not been accurately given by the testator, had been sufficiently identified by the affidavit of the plaintiff. The restraint on marriage was only partial and was supported by the authorities of *Jenner* v. *Turner* (16 Ch. D. 188) where a condition restraining marriage with a domestic servant was upheld. (Cf. *Perrin* v. *Lyon*, 9 East 70 as to marriage with a Scotsman.)

If the gift is of personalty, conditions in partial restraint of marriage are valid only if there is a gift over, as here; otherwise they are construed as merely *in terrorem* and void.

The *in terrorem* doctrine does not apply to gifts of realty, and it may be said that a condition in *partial* restraint of marriage attached to realty is always good, and one in total restraint *may* be good. The condition, though remote, was potentially operative and could not therefore be disregarded.

Plaintiff took the real and personal property, subject to defeasance upon his marriage contrary to the provisions of the codicils.

C. R. N. W.

PERPETUITY—CHARITIES—TOMB—CY-PRES.

In re Porter: *Porter* v. *Porter* [1925] 1 Ch. 748.

The testator directed his executors to pay the sum of £10,000 to the trustees of a Masonic Temple which he had erected to the memory of his son. The money was to be invested and applied to the maintenance of the Temple as the trustees should think fit; "the balance (if any) to be applied in favour of any Masonic Charity or Charities which the said trustees may in their full discretion select."

The case arose on an application to have the question determined whether the legacy was good or whether it was altogether void, or whether it was applicable *cy-près*.

No question could arise as to the primary gift for the maintenance of the Masonic Temple, for this was clearly void as not being for a charitable purpose under 43 Eliz., c. 4, nor coming under the rules laid down in *Commissioners of Income Tax* v. *Ramsel* [1891] A.C. 531. This was taken for granted and no argument was directed to the contrary.

When a fund is given for some purpose which the law does not allow, and there is a gift of the surplus to a charity, the general rule is, that the charity will be entitled to the surplus provided it can be ascertained how much was intended to be expended on the primary purpose. If this cannot be done the whole gift fails. Thus in *Chapman* v. *Brown*, 6 Ves. 404—Where there was a direction to build a Chapel, it was held that a gift of the surplus over to a charity failed along with the primary gift, because it could not be calculated how much of the fund would remain over after satisfying the void gift.

To this general rule there is a somewhat peculiar exception in the so-called "tomb cases," where a gift for the maintenance of a tomb is followed by a gift to a charity of any surplus that may be left over. Here it has been held that on the failure of the primary gift the whole fund is to be given to the charity. (*Fisk* v. *A.-G.* 4 Eq. 521; *Hunter* v. *Bullock* 14 Eq. 45; *Re Birkett* 9 Ch.D. 576.)

These decisions were criticised by Jessel M.R. in *Re Birkett;* and *Theobald* (Wills, 371) says that while they may be defended in some

cases as being merely the application of the principle, that where a particular fund is given as to part to A, and as to the residue to B, the gift to A, if it fails, falls into the particular residue and passes to B, While there is no such particular residue, but only a gift of any surplus that may remain after satisfying the void object, the cases are more difficult to explain and may have to be re-considered.

Here the gift to the Masonic Temple having failed the only question was as to the gift over to the Masonic Charities. If the rule in the "tomb cases" applied then the charities would be entitled to the whole fund, and if the rule did not apply but the circumstances were such that an inquiry could be held to ascertain the maximum amount required for the upkeep of the Temple, the charities would be entitled to the residue. Having regard to the difficulties of discovering the principle on which the "tomb cases" were decided, the learned Judge said that he did not consider that their application should be extended. Moreover, this was not a case where an inquiry could be ordered as to the sums intended for the Temple and the charities respectively. The ultimate gift to the latter was too indefinite and uncertain, and the testator clearly contemplated that the whole fund might be properly applied for the upkeep of the Temple. For these reasons the whole legacy was void.

D. J. Ll. D.

Gifts to Encourage Sports.

In re Gray: *Todd* v. *Taylor* [1925] 1 Ch. 502.

The testator gave a sum of money to form the nucleus of a regimental fund "for the promotion of sport (including in that term only shooting, fishing, cricket and polo)."

The only question that had to be decided was whether the gift constituted a good charitable bequest or not. No complete definition of a charitable bequest seems to exist. 43 Eliz. c. 4, contains a list of charities, but it is not exhaustive, and the four classes of charitable purpose enumerated by Lord MacNaghten in *Commissioners of Income Tax* v. *Remsel* [1891] A.C. 531 are sufficiently general to allow of considerable difficulty in particular cases.

It was held in *Re Nottage* [1895] 2 Ch. 649 that a gift for the promotion of sports is not a good charitable bequest, so that a gift to provide for an annual cup for the encouragement of yacht-racing could not be upheld. On the other hand, if the real intention of the testator is not merely to encourage sports, but rather to promote mental and bodily efficiency, his gift will be valid. Thus, in *Re Good* [1905] 2 Ch. 649 a gift to the officers' mess of a regiment to maintain a library was upheld as tending to promote the efficiency of the Army. *In Re Mariette* [1915]

2 Ch. 284 it was held that there is no difference for this purpose between mental and bodily efficiency, and consequently a gift to a school to provide facilities for sports was a good charitable bequest.

The present case came within the same principle, for the purpose of the gift was not to encourage sport in general or any sport in particular, but to benefit the officers and men by giving them an opportunity of indulging in healthy sport. The remarks in *Re Mariette* on the importance of physical development in the case of schoolboys apply equally to soldiers. On these grounds the gift was declared to be a valid charitable bequest.

D. J. LL.D.

EASEMENT—RIGHT OF SUPPORT—NUISANCE.

Sack v. *Jones*. [1925] 1 Ch. 235.

The plaintiff was, therefore, forced to allege that the defendant, by *allowing* her own house to fall away from the plaintiff's house and The houses were divided by a party wall. Severe fractures and cracks appeared in the plaintiff's wall, which she attributed to an outward subsidence of the defendant's house. It was admitted that the plaintiff and defendant had mutual rights of support. The plaintiff's chief claim was that the defendant was bound to offer the plaintiff's house, and more especially the party wall, positive support.

Astbury J., in giving judgment, said that the action failed as the plaintiff had failed to prove his facts, but he said, *obiter*, that even if he had established the facts the action would have failed.

The general principle laid down in *Pomfret* v. *Ricroft* (1669) 1 Saund. 321 is affirmed here, namely, that the occupier of the dominant tenement cannot compel the servient occupier to do any positive act within the ambit of the easement. The reason for this is clear, " For when the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. As if a man gives me licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me "—*per* Twysden J., in *Pomfret* v. *Ricroft supra*. See also *Colebeck* v. *Girdlers Co.*, 1 Q.B.D. 234.

The plaintiff was, therefore, forced to allege that the defendant, by allowing her own house to fall away from the plaintiff's house and drag it down, had committed an actionable nuisance.

But in *Jones* v. *Pritchard* [1908] 1 Ch. 630, following the persuasive authority of *Lyttleton Times Co., Ltd.*, v. *Warners, Ltd.* [1907] A.C. 476, P.C., it was held that a nuisance arising from the escape of smoke into the plaintiff's dining-room through cracks in a chimney, such cracks being caused by the subsidence of the defendant's house, gave the plaintiff no right of action in the absence of negligence, or want of reasonable care, on the part of the defendant.

In the principal case, the plaintiff was unable to allege any such negligence, and hence the action would have failed in any event.

It may be noted that, to the general principle laid down in *Pomfret* v. *Ricroft* (*supra*) there are certain rare exceptions. *In L. and N.W.R. Co.* v. *Fobbing Levels Commissioners*, 75 L.T. 629, it was held that where the liability of a frontager to keep a sea wall in repair at his sole expense had long been asserted and long submitted to, it will be presumed to have originated under a local custom or *ratione tenurae* or in some other legal fashion, unless and until it can be proved that it cannot have had a legal origin. This is in the nature of a positive easement. Another exception arises where the servient occupier has to fence or repair something on the servient land. See *Star* v. *Rokesby*, 1 Salkeld 335. This particular easement is common in other jurisdictions. See *Binney* v. *Hull*, 5 Pick. 503, *Bronson* v. *Coffin*, 108 Mass. 175, *Castner* v. *Riegal*, 54 New Jersey Law 498; also Jenks *Digest* (2nd edn.), § 1251.

G. R. U.

COPYRIGHT—ASSIGNMENT—INJUNCTION.

Sampson, Low, Marston & Co., Ltd., v. *J. M. Dent & Co., Ltd.*; *The Same* v. *Duckworth & Co., Ltd.*, "Times" Newspaper, Nov. 10th and 11th, 1925.

These were consolidated actions brought by the plaintiffs for an injunction to restrain infringement of copyright, and damages for infringement. The facts were as follows: In 1885, W. H. Hudson agreed with Messrs. Sampson, Low, Marston, a firm of partners, that they should publish his first book, "The Purple Land that England Lost." Clause 3 ran: "The author agrees to cede and assign to the publishers the exclusive right during the legal term of copyright in any part of the world, and empowers them to arrange for any reprint or translation of it as they think fit." By Clause 9 the agreement was to hold good with "the publishers, their assigns, and successors for the time being in their business and firm." By the Copyright Act 1842, the term of copyright was the life of the author plus 7 years, or a total of 42 years.

There was a small loss on the first edition, and the publishers did not attempt a second. In 1904, Messrs. Duckworth published the book as "The Purple Land," and continued to do so ever since. In 1906 the plaintiff company became incorporated. In 1922 Messrs. J. M. Dent brought out a collected edition of W. H. Hudson's works, including the book in question, under license from Messrs. Duckworth.

In 1924, Robert Marston, the sole survivor of the original firm, died, and the company was wound up and reincorporated. It now sued, as stated above, basing its claim on the agreement of 1885.

Two grounds of defence were raised :—

(1) That by the agreement of 1885 no copyright had passed, but only an exclusive right to publish, on the analogy of *In Re Clinical Obstetrics* (MacGillivray's Copyright Cases, 1905-10, 176).

(2) That the agreement was only with the firm as it was in 1885 (*i.e.*, a firm of partners) and ceased to be binding after the incorporation of the company.

(1) On this point, Russell, J., held that on the construction of the agreement as a whole, the copyright had not passed, although the parties had probably contemplated it. There were three reasons for this. (a) Because only one incident of copyright, namely, the right to publish, was mentioned. (b) Because no sum was paid for the copyright. (c) Because, although continuing obligations on the part of the publishers existed, the author had no power to compel further publication.

(2) As to this point, it was held that the parties clearly contemplated the continuance of the firm of partners, by reason of the wording of Clause 9, whereby assignment of the rights accruing from the agreement, was only possible to assigns and successors *in their business and firm.* The agreement was probably void after the incorporation of the Company in 1906, and was certainly so after its winding up on the death of the last survivor of the original firm, The Company was not an assign or successor of the partnership in the latter's business and firm.

R. G. D.

TRADE NAME—SIMILARITY OF NAME—INJUNCTION.

Motor Manufacturers and Traders, Ltd., v. *Motor Manufacturers and Traders Mutual Insurance Co., Ltd.* [1925] W.N. 69.

This was an action for an injunction to prevent the use by the defendants of a name so similar to that of the plaintiff company that confusion was certain to occur. The plaintiff company was incorporated in 1902 as a Trade Protection Society; the defendant company was incorporated in 1924 to insure against risks to motor cars and other vehicles.

The plaintiffs contended that if at any time the defendant company were wound up, or were unable to meet their obligations, the similarity of the names might affect the credit of the plaintiff company. They had protested to the defendants on these grounds as soon as the defendant company was formed, and sued because the latter failed to comply with the request that they should change their name.

Lawrence J., held that the case came under the test of Lord Low, quoted by Lord James of Hereford in *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.* [1907] A.C. 430, namely, that no action would lie

if the similarity were only such as to cause confusion in the mind of a thoughtless and unreasonable person. In the present case, the names clearly showed the difference in the nature of the business carried on by the respective companies. No charge of fraud was raised, and therefore a heavy onus lay upon the plaintiffs to prove the likelihood of damage to their reputation and credit.

The learned judge further held that the plaintiffs could have no monopoly of the right to use the common descriptive words "Motor Manufacturers and Traders," and that to grant an injunction might have the effect if, at some future date, the plaintiffs should wish to take up the business of insurance, of giving them a monopolistic advantage in respect to that kind of business.

R. G. D.

Extent of Shareholders' Interests.

Macaura v. *Northern Assurance Co., Ltd.* [1925] A.C. 619.

In deciding this appeal from the Irish Courts the House of Lords has been concerned to examine the topic of shareholders' interests and to define the rights which they possess in the assets of the company in which they have acquired shares. The facts presented were simple and might well have been contrived expressly to demonstrate the pragmatic harshness of the somewhat artificial rule which was sustained.

The appellant formerly owned a timber estate in Northern Ireland, but sold the timber to a Canadian milling concern, agreeing to accept payment in shares of the company. He received 42,000 £1 shares, which represented a payment of £27,000 in respect of the timber conveyed and £15,000 to reimburse him for the expense of cutting up timber already severed. Apart from the 42,000 shares of £1 nominal value which were held by the appellant or his nominees, no shares were issued. The appellant was also a creditor of the company to the extent of a further £19,000. The company had virtually no assets apart from their licence to enter on the appellant's estate to cut timber. The appellant took out a fire insurance on the timber still remaining on his estate in his own name and the name of his bank to whom he owed a large overdraft. Shortly afterwards very considerable damage was caused by fire and the appellant sought to recover. It was held in the lower courts, and finally in the House of Lords, that he had no insurable interest in the timber, because, as Lord Sumner expressed it, "His relation was to the company, not to its goods." Lord Wrenbury concisely summed up the grounds upon which the decision rested when he said: "The corporator, even if he holds all the shares, is not the Corporation, and neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation."

The shareholders' interest is, to quote Lord Buckmaster in the present case, " limited to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when it is wound up "—whereas the interest of the Company is in the property which it owns. (It is interesting to speculate in passing who is entitled to the property of a company which is not wound up, but merely ceases to exist under the Companies (Consolidation) Act 1908, section 242, as to which the Act is strangely silent, and there is little or no authority).

No previous decision bound the Lords but such persuasive authority as already existed pointed them, without ambiguity, to the conclusion at which they arrived in the principal case. Even in so old an authority as the Digest of Justinian there is clear recognition of the distinction between a corporation and the aggregate of its members (Cf. III, 4.7.2. "*Si quid universitati debetur non singulis debetur: nec quod debet universitas, singuli debent*)." This principle was followed in *Flitcroft's Case*, 21 Ch.D. 519, in which the directors of a company were held liable for money paid out of capital to all the shareholders despite their plea that the money had, in fact, been paid to and received by the Corporation.

Again, in *Colonial Bank* v. *Whinney*, 11 A.C. 426, Fry L.J., said: " In case of a corporation the individual corporators have no direct interest in the *choses in possession*; they have the benefit of an obligation existing between the company and themselves, *a chose in action*."

Thus there has been no conflict of principle in the line of English decisions, the most important of which were *Wilson v. Jones* (1867) L.R. 2 Ex. 139, and *Paterson* v. *Harris* (1861) 1.B. and S. 354.

Nor are the decisions of the American Courts inconsistent in principle with the two cases cited above upon which the House of Lords, in the present case, may be said to have mainly relied. For neither in England nor America has a shareholder ever been held to have any proprietary interest in a specific asset of the company of which he is a beneficiary. In the latter jurisdiction, however, the courts are prepared to construe an insurance policy expressed to be upon such a specific asset as though it insured the shareholder against any prejudice to his equitable interests in the profits and surplus assets of the company which might arise from the loss or deterioration of the particular asset. Whereas, the English courts have always required the policy to be taken expressly upon the shareholder's capital or prospective dividends, *eo nomine*.

The decision of the House of Lords which is here under discussion illustrates the injustice which may be wrought through the stringent logical application of a theoretically sound principle. Principles of law tend to develop along a line of logical extension and to become fortified as they grow, and it is desirable, in the interests of uniformity and certainty, that a legal system should avoid all possible anomalies. Yet from time to time conflicting considerations of public policy may compel some modification. The juristic theory of Corporations came into the common law at a time when business companies had not

to be reckoned with, and it is, at least, open to question whether some reconsideration of this topic is not nowadays demanded, in view of the ever-increasing part which such juristic persons play in our modern social life. The problem of emending the concept is productive of infinite perplexities, yet it seems to offer a worthy field for endeavour. That a corporation should not be liable in an action of Tort for wrongs committed by its servants in the apparent scope of their employment, if such acts are in fact *ultra vires* of the company, is a consideration which might well afford matter for juristic thought.*

Further, the principal case demonstrates very strikingly the manner in which, under the working of the present theory, a Corporation which has come into existence entirely by the voluntary act of its incorporating members may have attributed to it interests differing radically from the interests of those members, and overriding them. If the members are in a plurality, the anomaly is not so glaring for "*quot homines, tot sententiæ*," and there may well be no agreed opinion among them as to their best interests. But considering such a set of circumstances as the following :—A number of men form a company and contribute funds to be used for buying a timber estate with the object of developing it, taking in return shares in the company. Prior to the formation of the company they each had absolute right of property in their money, and this money is now represented by ascertainable real property, and yet, in the legal theory, the shareholders have no interest at all—and *a fortiori* no interest *in rem*—in the timber estate. The fictitious person which they have created and named "The X Company" owns the timber and has the right to it against all the world, including the men whose money bought it, and for whose benefit and by whose volition it was acquired. They have merely a right *in personam* against the company, a mere claim to be allotted a share in the profits, if there are any, and in the surplus assets on winding up. The law will not permit them to insure the timber, even though it is the sole asset and their whole holding in the company is sunk in it and must perish with it.

It is submitted that the legal theory is divorced from actuality, and that in developing the conception of corporate personality elegance and logic have been preferred to equity and expediency.

There can be but little doubt that in the present case a decision embodying the American rule of construction, enunciated in *Riggs* v. *Commercial Mutual Insurance Co.* (1890) 125 N.Y. 7, would have been both equitably and pragmatically preferable.

C. R. N. W.

* The problem mentioned by our contributor is discussed in an article above.—[Ed.]

BOOK REVIEWS.

Cambridge Legal Essays, written in honour of, and presented to, Dr. Bond, Professor Buckland, and Professor Kenny, by past and present colleagues and pupils at Cambridge. W. Heffer & Sons, Ltd., Petty Cury, Cambridge. 12*s.* 6*d.* net.

The presentation of this volume of Essays to three famous Cambridge lawyers by their past and present colleagues and pupils is a grateful act of homage, which is more frequently paid to distinguished teachers abroad than in this country. The value of the volume is enhanced by their portraits, and by the slight biographical sketch of their careers which it contains. All these three lawyers represent important sides of Cambridge law teaching and Cambridge life. Dr. Bond's eminence as a law teacher in a college which has a traditional connection with law, and his devotion to all the aspects of its life, makes him an ideal Master of Trinity Hall. Professor Buckland is one of the few men who have proved that hard work as a college tutor is compatible with research; for it was during his years of work as a tutor that he was making himself the most learned authority on Roman law in English speaking countries. Professor Kenny is best known as the writer of the best students' text-book which has appeared since the publication of Blackstone's Commentaries. Its excellence is due, not only to that quality of literary tact which Dicey rightly thought was one of the greatest excellences of Blackstone's Commentaries, but also to the Professor's experience as a Member of Parliament, and as a chairman of Quarter Sessions. Life, logic, and literary ability have combined to make the " Outlines of Criminal Law " a perfect text-book.

These Essays cover so many different sides of legal learning that no one reviewer could possibly do justice to all of them. Mr. Alexander discourses of Conveyancing, and of the effects upon conveyancing of the new Acts, in a paper which will be very valuable to all students of these Acts, both young and old. Private International Law is represented by Professor Beale, who has written a learned and suggestive paper on the International Jurisdiction of Courts. Mr. Bolland has used his unique knowledge of the early Year Books to give us a convincing account of the manner in which a judge of the early fourteenth century got his training. Mr. Carr has contributed a paper on the citation of statutes, which contains much information which is new to this reviewer, and plea for a more rational method of citation. Mr. Duff contributes a valuable paper on the Charitable Foundation of Byzantum, which tells us much of the manner in which such connected

topics as charitable trusts and corporations were envisaged in Roman law. Roman law is also represented by papers by Mr. Jolowicz and Mr. Oliver. Mr. Jolowicz uses the Babylonian and Hittite codes to suggest a new interpretation of the penal provisions of the Twelve Tables. Mr. Oliver, in a paper which should go far to confute the views of some who question the usefulness of the study of Roman law, shows how much Roman law has influenced in varying degrees the law administered in the courts of those many states which owe allegiance to the Crown. Mr. Goodhart gives us some very good reasons, with which we agree, for questioning the soundness of the decision in *In re Polemis*. Professor Gutteridge, exploring a little-known backwater of the law, has elucidated the history of the Notary Public in this country. Professor Hazeltine has written a suggestive essay on the Renaissance and the Laws of Europe, in which he makes the important point that the rise of the territorial state in the sixteenth century, though it owed something to the political teaching of Roman law, though it made for the reception of some of the doctrines of Roman law in varying degrees in different states, was, nevertheless, the starting point of the decline in the influence of Roman law, and of the rise of national systems of law. Professor Pearce Higgins contributes a suggestive paper on Grottius and his work, and on the message which that work has for us to-day. Professor Jenks deals with the question of the manner in which it came to be regarded as irregular for a jury to give a verdict from its own knowledge. He makes it probable that here, as in other cases, the pressure of equity and the influence of Lord Mansfield have had something to do with the settlement of the law in its final form. New ground is broken by Dean Pound's paper on the origins and history of certain maxims of equity—an important problem for the historian of equity in the late seventeenth and eighteenth centuries. Mr. Salt has given us a suggestive paper on local customs, and on the manner in which, and the conditions under which, the common law allows them to be operative. Mr. Wade has dealt very lucidly with the vexed question of the treatment by the courts since the Judicature Acts of the equitable conception of misrepresentation. Mr. Walter Jones has given us a valuable paper upon the treatment of rights of various kinds by political and legal theorists.

We have found little to criticise in these Essays. But there are one or two points which should be noted. It is not correct to say that John Asgill, of Lincoln's Inn, who died in 1739, was the first person to advocate registration of title. Roger North tells us ("Lives of the Norths," i, 141) that Lord Keeper Guilford favoured the project, and "worked seriously upon it." Professor Hazeltine cites with approval Sir F. Pollock's remark that the contributions made by equity "account for most of our Romanist importation." That may be true of the mediaeval period when equity was being developed by the ecclesiastical chancellors; but we doubt whether much further borrowing was made when the development of equity was turned over to chancellors who were English lawyers. After the sixteenth century the

development of equity was very much on national lines; and we should be inclined to think that more Roman law was imported by way of the law merchant, maritime law, and ecclesiastical law than by way of equity. Dean Pound, dealing with the maxim "Equity acts in personam," considers that the discussion of it in Spence's history gave it currency. But we think that the fact that it is stated by Lord Hardwicke as the ground of his decision in the leading case of *Penn* v. *Lord Baltimore* (1750) 1 Ves. Sen. at p. 447, had at least as much influence in this direction

But these are rather minute criticisms. The Essays are worthy of the teachers to whom they have been presented; and we think that when we have said that, their authors would agree that we have given the highest praise which it is possible to give them.

W. S. H.

A Manual of Roman Private Law. By W. W. Buckland, LL.D., F.B.A., Regius Professor of Civil Law in the University of Cambridge. Cambridge University Press. 1925. xxvii and 432 pp. 16*s*. net.

Any publication on Roman Law by Professor Buckland must be welcomed with interest and gratitude by all serious students of the subject, whatever may be their ages and experience. Their needs, however, are various, and it is not everyone who has the time which is required for a proper study of such detailed treatises as the author's "Roman Law of Slavery" and his "Text Book of Roman Law." The present book is of more modest dimensions, and it will, therefore, appeal especially to those whose available hours for this study are limited. Although it covers much the same ground, the Manual is not a *résumé* of the Text Book, but is a restatement of the law on a smaller scale, embodying the result of the author's latest investigations. It is a common fallacy to suppose that the smaller the book, the easier. It is, of course, much more likely to be the harder, unless, indeed, brevity be secured at the price of important omissions. An ox compressed into a tea cup would be a pabulum somewhat difficult of digestion. Professor Buckland's outstanding achievement in the work under review is that the whole field of Roman Private Law, from the classical period to the time of Justinian, is surveyed and reduced to so comparatively small a compass without adding to the difficulty of the reader. Indeed, the book is a remarkable combination of lucid exposition, and a truly Tacitean economy of words. Two conspicuous examples of these qualities may be mentioned in the paragraphs on Possession and Settlements: nothing could be more comprehensive and nothing more clear. This is a result which only mastery of the subject and painstaking

industry could effect. At the same time it must not be supposed that the reading of this book is child's play, even if there are but few passages to which the description *Africani lex* could be justly applied. There are some topics in Roman Law, such, for instance, as *capitis deminutio* and *custodia*, which are obscure, partly, perhaps, owing to their inherent difficulty and partly because the information which the texts afford is scanty or confused. The great complaint against many text-books is that, to the exasperation of the inquisitive student, their authors have preferred a dignified silence to a frank admission of ignorance on certain points, and that on others they have proceeded by imagination rather than by examination to statements which are not warranted by the sources. Needless to say, the intense intellectual honesty of Professor Buckland precludes his aiming at a specious simplicity by such means as these; therefore, in each case the difficulties of the matter are fairly posed to his readers. The hardest part of the book is the Introduction, and those who come fresh to the subject would be well advised to read it last instead of first. A welcome innovation is the appendix, setting out examples of the principal *formulæ;* and we note with relief that throughout the book the numbers of the paragraphs are shown at the head of each page. The omission of this in the Text Book is a source of great embarrassment to a reader anxious to take up the cross references. In the preface this valuable manual is modestly announced by the author as designed for the use of beginners, but he will be an expert civilian indeed who will not profit by its study.

J. W. C. T.

Goodeve's Modern Law of Personal Property. 6th edition. Revised by David T. Oliver, LL.M., LL.D., Fellow and Law Lecturer of Trinity Hall, Cambridge. Sweet & Maxwell. 1926. pp. 552.

Dr. Oliver needs no recommendation to Cambridge men, or, indeed, to the " knowing " lawyers of other universities, both here and abroad. For those who have not had the advantage of sitting at his feet, it is enough to say that they may rely, without fear, upon his careful study of his subject and upon the clarity of his exposition.

Generations of teachers and students have lamented the absence of any satisfactory text-book upon the law of Personal Property. The great majority of students have been deterred by the length and learning of the better authorities, while teachers have had to strive hard to prevent an indiscriminate use of cram-books and such like methods. Dr. Oliver's new edition of Goodeve will receive a warm welcome, if only because it meets these needs. Apart from the merits of its matter, it is distinguished by its arrangement. The chapters are not small books in themselves, and each is subdivided into sections, which, in their

turn, are divided into comparatively short paragraphs, each with a title in the margin. The reader thus can open it without feeling that he is starting down a lane that has no turning, and the task of finding exactly the passage required is very much simplified.

In these 500 pages a wide field is traversed. The first 150 pages are devoted to chapters on Property and Possession, Bailments, Sale of Goods, Gifts, Bills of Sale, etc. Then follow a number of more special topics, such as Negotiable Instruments, Insurance, Patents, Copyright, Companies, Bankruptcy. In addition there are chapters on Capacity, Limitations, and Execution. Last, but not least, there is an account of the devolution of property on death, which will prove a great boon to many who have hitherto struggled in vain to get a grasp of the main principles. The whole book incorporates the changes in general principles wrought by post-war legislation; in his preface Dr. Oliver expresses a fear that he has "been guilty of sins both of omission and commission." Without daring to contradict, the present reviewer can only say that he has failed to find any, and that even if he had he would still maintain that the book continues in an even more admirable way than heretofore to fill a great gap.

The subject is too wide to permit of any great detail, and it is unlikely that the book will become an authority to be cited in the courts. On the other hand, it provides a first-class introduction to a number of very important subjects, both for lawyers and business men; and it will be exceedingly surprising if "Oliver's Goodeve" does not become the standard text-book for students which it deserves to be.

M. E. R.

A History of English Law. By W. S. Holdsworth, K.C., D.C.L., Vinerian Professor of English Law in the University of Oxford. Vol. VII, pp. xxxii, 575; Vol. VIII, pp. xxxii, 500. Methuen and Co. 1925. 25*s.* net per volume.

In volumes IV-VI of his "History of English Law," Dr. Holdsworth gives an account of the sources and general development of the common law and its rivals in the period from 1485 to 1700; while in these two new volumes he completes the history of this period by dealing with the doctrines of the law. Volume VII is devoted to the history of real and personal property; Volume VIII is concerned with the law of contract and tort, mercantile law, and criminal law. While the two volumes deal primarily with the law of the sixteenth and seventeenth centuries, they include also a history of many doctrines down to the nineteenth century. Branches of law omitted from these volumes will be considered by the author in a further volume now in course of preparation. It is to be hoped, moreover, that he will

ultimately bring his great work to completion by dealing with the sources and general development in the eighteenth and nineteenth centuries, and by considering those aspects of the doctrinal history of these two centuries which he has not brought within the compass of volumes I-IX. Fortunately there is a hint in one of the present volumes of the author's intention to bring his " History of English Law " down to the twentieth century, if time and opportunity serve. One trusts that Dr. Holdsworth will not allow other lines of literary work to stand in the way of his study of these final stages in English legal history. Lawyers and scholars are greatly in need of a detailed historical account of the law from 1700 to our own day; and they will now place all their hopes in Dr. Holdsworth's industry, learning, and skill.

In view of the great importance still attaching to the study of the history of real property, even after the enactment of the Property Legislation of 1922-25, students and teachers, as well as practitioners, will welcome Dr. Holdsworth's seventh volume. Despite its revolutionary features, the new statutory law of real property is fundamentally the result of a long evolution. Dr. Holdsworth's volume gives the reader the necessary historical background of the new law; and, without that background, many sections of the Acts that are now in force cannot be understood. Take, for example, the sections which deal with future interests. The new law which they embody is based in large measure on the old law. The student or lawyer who has to do with this new law of future interests will find valuable assistance in those portions of Dr. Holdsworth's volume which deal with contingent remainders (pp. 81-116), executory interests (pp. 116-149), powers of appointment (pp. 149-193), and the rules against perpetuities (pp. 193-238). Here the reader will discover a considerable part of that historical learning which it is so important for him to acquire and put to his service. Dr. Holdsworth shows us, for example, why the rules against perpetuities were needed, he describes the older rules and sketches their history, he states the modern rule and gives us its historical setting, he deals with the rule against accumulation, and he considers the historical and theoretical relations between all those various rules. He says (p. 237) that " it was on the whole fortunate for the development of the law that the attempt to deal with the problem of perpetuities by legislation in 1597 proved to be abortive " (see pp. 198, 214, 218, 219, and also Appendix II, where the text of the Elizabethan Bill of 1597 is set out). " The rules, both of law and equity, as to the conditions under which future interests in land could be created," he continues, " were not then sufficiently definite; and the problem of the creation of future interests in personalty had not yet arisen. A statute like that proposed in 1597 would have hindered the development of the law as to the creation of future interests in freeholds; and it would have been quite inadequate, as it did not touch the problem of the limitation of future interests in terms of years or in chattels personal " (p. 237). But there comes a time, Dr. Holdsworth further

remarks, when a body of legal principles developed through cases needs a restatement. " It was obvious to the Real Property Commissioners that the time for such a restatement had come at the beginning of the nineteenth century; and they made a series of suggestions as to the form which such a restatement should take " (p. 237). Although those suggestions had no statutory result, recent legislation, declares Dr. Holdsworth, has solved the problem. " It has, in effect, restated this branch of the law of property, which is one of the most important of all its branches, because it defines the chief limitation upon that essential incident of the right of property—the right of the owner to dispose of it as he will " (p. 238).

Of the several topics of interest and value to students which Dr. Holdsworth considers historically in his eighth volume, special attention may be drawn to his sections on the doctrine of consideration (pp. 2-48), on the law merchant (pp. 99-300), and on the principles of criminal and civil liability (pp. 433-482). He deals with the term " consideration," and, after tracing the history of consideration from the sixteenth to the early nineteenth centuries, he gives us the main points in the settlement of the modern doctrine. The author's treatment of the vexed subject of " cause " and " consideration " is illuminating; while at the end of his section on consideration he passes naturally and properly from the rôle of historian to that of reformer. Not the least interesting of the pages in the eighth volume are those in which he tells us why the doctrine of consideration is an anachronism (p. 47), and makes suggestions for the law of the future. The weakness of the doctrine of consideration, he declares, is that it is " inadequate as the sole test of the validity of simple contracts. The true remedy, therefore, is not to scrap it, but to reduce it to a subordinate place in the English theory of contract " (p. 48). Our author proposes, therefore, that Parliament should pass a short Act abolishing the differences between simple and specialty contracts, repealing § 4 of the Statute of Frauds and § 4 of the Sale of Goods Act, and providing that " all lawful agreements should be valid contracts, if the parties intended by their agreement to affect their legal relations, and *either* consideration was present, *or* the agreement was put into writing and signed by all the parties thereto " (p. 48). Such a measure, he maintains, would not only reduce consideration to a subordinate place, but greatly simplify the English law of contract. It is clear that in making this suggestion Dr. Holdsworth is under the influence of Lord Mansfield (see pp. 25, 26-31, 47); but his proposal for reform is not less worthy of careful attention by reason of that fact.

The section of the eighth volume on the principles of liability, criminal and civil, is of great value to the student of jurisprudence (see pp. 433-482). No one can read this section attentively without coming to the conclusion that the study of jurisprudence is inseparably connected with that of legal history. Dr. Holdsworth shows us clearly, for example, that the modern principles of civil liability are based on a long historical development in which medieval ideas survived into

later times and influenced the growth of the law. Many jurists who deal with the subject of liability on a purely analytical method would profit from a perusal of Dr. Holdsworth's pages.

While these two latest volumes of the " History of English Law " deal professedly only with the development of legal doctrine, they are, nevertheless, of great value to the student of the social, economic, and political history of England. No historian of economic development, for example, can afford to leave unread the long chapter on the law merchant in the eighth volume. Taken together the two new volumes constitute a most important contribution to the history of the legal aspect of modern English life. They prove to us afresh how intimately the law of a nation is related to all the other features of its inner growth and expansion.

H. D. H.

Sources and Literature of English Law. By W. S. Holdsworth, K.C., D.C.L., F.B.A. Oxford, Clarendon Press. 1925. pp. x and 247. 10*s.* 6*d.* net.

This review must begin with an apology. In our estimate of volume VI of the learned author's " History of English Law," which we made last year in this journal (volume II, at p. 269), we passed an undeserved criticism, based on a mistaken reading, of " Hale " for " Holt." We had hoped to express our regret for this stupid slip in an appreciation of volumes VII and VIII in this number, but the pleasure of reviewing them has been reserved to us elsewhere.

As to the book before us, it is difficult to add anything to Lord Justice Atkin's opinion of it in the Foreword: " I know of no work of this size which deals so completely and in such just perspective with the manifold sources of the English Law." The truest thing we could say of it might be reduced to a single sentence. To the author we should tender our sincere congratulations; to every reader of this journal and to every law student in general we should say, " Read the book." Something more than this is, perhaps, needed to acquit us of brusqueness, but whatever that something be, it certainly will not be more to the point. Professor Holdsworth has the gift of putting the reader on a height from which he can get a bird's-eye view of the external causes which have shaped the growth of English Law and of the records of the law itself. It might be retorted that this is no more than one would expect from a lecturer with the vast store of his " History of English Law " at his command. But this is no mere epitome of the profound learning embodied in the eight volumes of that great work; it is a sympathetic study adapted to the needs of everyone who wishes to know something of the history of our law. Nor is it only beginners who can learn from these lectures. Especially valuable are the chapters

on the developments outside the Common Law. One is inclined to overlook the later influences of the Civil Law, and an excellent corrective to that tendency is the summary on pp. 234-235. Again, two points are effectively made as to the position of legislation in early English Law. First, Maine's thesis that the order of legal development is fictions, equity, and legislation, will not fit the facts of our legal history, for legislation played a great part therein from the beginning. Secondly, paradoxical as it may appear to some readers, " without legislation which made new law, the common law could not have come into existence." Those who wish to probe this statement further will find Mr. Plucknett's monograph (pp. 134-136, 164-167) helpful.

We have detected only the following trivial misprints for correction in the next edition: " case " for " cause " (p. 20); " Axo " for " Azo " (p. 28); " Stfit " for " Stift " (p. 80); " Augumentis " for " Augmentis " (p. 92).

P. H. W.

The Chief Sources of English Legal History. By PERCY H. WINFIELD, LL.D., Fellow and Law Lecturer of St. John's College, Cambridge, and of the Inner Temple, Barrister-at-Law. Harvard University Press. 1925. pp. xviii, 374. 20s.

Dr. Winfield has based his book on a course of lectures which he delivered in the Law School of Harvard University in 1923; but, from the point of view of his attention to recent literature, he has brought his matter down to July, 1925, the date of the preface. He states in the preface that the typescript was out of his hands before he received a copy of Mr. F. C. Hicks' *Materials and Methods of Legal Research.* " I believe," writes Dr. Winfield, " that [Mr. Hicks and I] have in view much the same kind of reader, though our methods of approaching him differ in some respects " (p. ix).

Dr. Winfield's book is not a bibliography, although it contains much valuable bibliographical material upon all the periods of English legal history; it is, in the author's own words, " a guide to the chief sources." It is, in fact, the very book which beginners in research in English legal history ought to read and re-read; and, moreover, it is a book from which trained legal historians will gain much useful information and many hints as to the nature and relative importance of the several categories of materials. All readers of the book will profit by a perusal of Dean Pound's illuminating Introduction (pp. xiii-xviii), in the course of which he justly remarks that " there is need of a like history of the sources and literature of American law."

Among the " sources," in Dr. Winfield's sense, are the literary works on the law, such as those of Bracton, Coke, and Blackstone. Indeed, all the materials that may be regardel as authorities for a knowledge of English legal history are brought by Dr. Winfield under the term

" sources." He has dealt, however, only with the " chief sources "; and, within these limits, he has written a work that should inspire some of the recent graduates of our law schools with an ambition to engage in research and to make contributions to the literature of English legal history.

In the first two chapters Dr. Winfield deals with " the equipment for research in legal history " and " existing bibliographical guides ", while in the third and fourth chapters he is concerned with " the sources of Anglo-Saxon law " and " the influence of Roman law." After these introductory chapters (pp. 1-69) he considers successively the sources which fall under the headings of " statutes " (pp. 70-102), " the public records in general " (pp. 103-144), " case law " (p.p. 145-199), " abridgments " (pp. 200-251), and " textbooks and books of practice" (pp. 252-340). In each chapter of the book we possess the author's lucid, learned, and critical account of the matter in hand and also valuable bibliographies of its several aspects. As a result the book constitutes a most useful repository of much of the available lore in regard to the sources which have been brought under review. While scholars will feel regret that the author has dealt with some important topics in only a very brief manner, they should remember that he has professedly written a work for those who are beginning to research. It is to be hoped that at a later time these topics will be treated more fully by Dr. Winfield.

Of the many features of the book which call for special comment only a few can be mentioned in this brief notice. In his recent work, *The Sources and Literature of English Law*, Dr. Holdsworth maintains, in support of the position taken by Mr. Plucknett in his *Statutes and their Interpretation*, that " it has never been the view of the common lawyers that the common law was a fundamental law which Parliament could not change " (p. 42). It is to be regretted that Dr. Winfield has not given us his own view upon this controverted point. His gaze is fixed almost exclusively, however, upon the bibliographical aspects of our statute law; and his table of the " original " and the " secondary " sources of statutes (pp. 98, 99) possesses a value to researchers out of all proportion to its length. Again, it may be remarked that Dr. Winfield's chapter on " case law," in which he deals with the theoretical as well as the bibliographical aspects of the subject, is one of the most valuable of all recent writings on the history of jurisprudential thought. To many readers two of the most interesting and useful parts of the book are those in which Dr. Winfield has dealt with the " Abridgments " of the Year Books (pp. 200-238) and the " Registrum Brevium and the History of the Writ " (pp. 286-302). In these sections, as well as in many other parts of his book, we have presented to us the results of the author's first-hand study of the manuscript materials.

The reader of this important contribution to our knowledge of English legal history will await with interest and confidence future works from Dr. Winfield's facile and erudite pen. H. D. H.

La conception anglaise de la saisine du XII^e au XIV^e siècle. (Etudes de Droit Anglais, I.) Par F. Jouon des Longrais, Docteur en droit, Archiviste Paléograph Chargé de conferences à la Faculté de Droit de Paris et à l'Ecole des Hautes Etudes. Paris: Société anonyme du Recueil Sirey. 1925. pp. 488.

Dr. Joüon des Longrais has written an interesting and instructive monograph on seisin in the English middle ages in its historical relation to seisin (*gewere, saisine*) in Continental countries. In his introductory pages he considers the several theories of modern scholars in regard to the nature of seisin; while in the main parts of his book he deals with the fundamental ideas of English property law, the "diverse seisins" of free tenures, and the history of dower in its relation to seisin. In a second volume which he has in preparation the learned author proposes to give an historical account of the assizes of novel disseisin and mort d'ancestor and of feoffment with livery of seisin.

The main aim of the author is to determine whether the prevailing theories of medieval seisin held by Continental scholars are compatible with the history of seisin in England. Inasmuch as the dominant ideas of seisin in Continental legal literature run counter to some of the views expressed by Maitland and other English legal historians, the present monograph will be read with more than a little interest by scholars in this country and in the United States of America. Apart altogether from its character as a repository and evaluation of theories, the book possesses value as an historical study of certain of the main features of English land law in the middle ages.

There is, however, another aspect of Dr. Joüon des Longrais' volume which is worthy of notice. The book embodies the results of much scholarly labour in the field of comparative legal history. Particularly instructive are the author's comparisons of medieval seisin in France and in England. By studies such as this, scholars are enabled to draw conclusions as to the nature of legal institutions and ideas that are common to two or more countries; and they can picture to themselves in clearer perspective those features of development which mark off the law of one country from that of others. The author deals with Germanic ideas of seisin that are common to France and England; and he also considers the effect of the Italian legal renaissance upon these ideas in both countries. He has entered a difficult, but fascinating, field of inquiry in that branch of comparative law which is concerned with historical growth as distinct from the system of present-day rules and principles; and he may rest assured that scholars in England will await the appearance of his second volume with an interest equal to that awakened by the reading of his first.

The author's style is not an easy one; and his arrangement of matters entails many needless repetitions. Although, in fact, the present volume is somewhat wooden in its form and structure, it embodies much learning from which the diligent reader will profit. Only when

the reader is in possession of the second volume, which is designed as a continuation of the first, will he be able to pass a judgment on the substantive merits of the whole work in detail. It is unnecessary to wait for the second volume, however, before remarking that it is no mean achievement for a foreign scholar to write a book on the stiff subject of English medieval land law. Dr. Joüon des Longrais has mastered many of the intricacies of the subject; and his conclusions, based as they are on a first-hand study of the original materials, are worthy of careful attention and respect. Not all scholars will agree with some of these conclusions. But that is a matter of secondary importance. The principal thing to observe is that the learned author has introduced into the literature of English seisin a current of fresh ideas.

H. D. H.

The Modern Law of Real Property. By G. C. Cheshire, B.C.L., M.A., of Lincoln's Inn, Barrister-at-Law, Fellow of Exeter College, Oxford. Butterworth & Co. 1925. pp. xxxvii and 784 and 30. 35*s.* net.

Let it be said at the outset that all teachers of Real Property Law owe a great debt of gratitude to Mr. Cheshire for this book. Without it we and our students should have been in a sorry plight during the past year. And it has deservedly received from eminent masters in the law recognition of which any legal writer might be proud. Professor Holdsworth has written in the "Law Quarterly Review," "It is the great merit of Mr. Cheshire's book that it brings out this continuity between the new law and the old, and so teaches students that the true method of approach to an undertaking of the new law is the historical method. Indeed, students are fortunate in having a text-book so skilfully constructed on these lines. I think that the successive editions of this book are destined to instruct many generations of students in the mysteries of the new law of property, even as the work of Joshua and Cyprian Williams has instructed many generations of students in the mysteries of the old law."

And in the "Harvard Law Review" Professor Joseph Warren delivers a concurring judgment, declaring the author to be possessed of a high order of ability in exposition and in clearness of style, and to stand near the top of his profession so far as concerns knowledge of the new era in the law of real property.

At the present stage any book on the Law of Real Property must be experimental. We hope that Mr. Cheshire will not regard himself as too closely bound to the form of his first edition, produced under great

difficulties. We suggest that the proportions between the amounts allotted to the several topics require some reconsideration. A great deal of space is given early in the book to terms of years absolute and easements and profits. We regret that the author gave so much work at a time of great pressure to these topics, as there are good books upon them available for students. And though they must be mentioned at this stage in the book as being interests recognised "at law," we should prefer that they should here be described in outline only, and not in detail. After all, it is the methods by which and the conditions under which interests in land can be created in succession *in futuro* which are both the most difficult and the most characteristic features of the English land law, and the sooner the student comes to grips with them, before his interest in what most find an arid subject wanes to vanishing point, the better. In comparison with 113 pages given to terms of years absolute, and 69 to easements and profits, future interests are treated in 59, an insufficient space in which to cover the distinction between vested and contingent interests, the rules against remoteness, and conditions. Nevertheless, we do not know any preliminary account of these matters which students are likely to find as readable and intelligible. It contains some mistakes. We hope that Mr. Cheshire will abandon his heretical proposal to apply the term "remainder" indiscriminately to interests limited to take effect on the determination of prior interest, and to interests in defesance of a prior interest. In spite of the accurate heading on page 448 "All future freehold interests are equitable and correspond to the old equitable contingent remainders and executory interests," he slips on page 449, into the statement that "the only future interest which can now be limited is one which corresponds to the old equitable remainder." Though the new legislation drags so many terms, such as fee simple and hereditaments, from their etymological moorings, it would be a pity to disturb the term "remainder," which retains its technical meaning in peerage law.

The distinction between vested and contingent interests requires fuller explanation. It is said on page 453 that one of the reasons why it is important to make the distinction is that "an interest which is vested is capable of passing under a will or on the intestacy of the owner, notwithstanding that he may not have obtained possession of the land." This suggests erroneously that a contingent interest cannot devolve on the death of its owner. And the statement on page 472 that a person has a vested interest when he is entitled to something certain as distinct from something uncertain or conditional, is too simple to be true. Upon the limitation of land to A for life, with remainder to B for life, the English law has traditionally regarded B's interest as a vested remainder, although his enjoyment is conditional upon his surviving A.

Professor Warren has expressed the opinion that Mr. Cheshire's book is intermediate between a treatise and a manual. We should like to see Mr. Cheshire expand his book into what would be indisputably recognised as an authoritative treatise. He would require two volumes,

but it would be a great thing for law students to learn that the compression of a difficult subject out of regard for space only makes it harder.

H. A. H.

Williams' Principles of the Law of Real Property. 24th edition. By Professor R. A. Eastwood, LL.D. Sweet and Maxwell, Ltd. 1925.

We regret that Messrs. Sweet and Maxwell did not decide that this famous book, pioneer work of the great Joshua Williams in the days when there were no law treatises suitable for students, tended through twenty-three editions, first by its author and afterwards by his distinguished son, should join the ranks of the legal classics. That it should pass into the hands of any other editor will be regarded as a desecration by the few who care about scholarship in the field of Real Property law. We should have liked to see a reprint of the last edition of the real Williams, summarising, as it did, the law as it was at the end of a long era, for that edition will be for many years both a desirable introduction for the beginner and a mine of useful information for the practitioner. A continuation volume could well have been written carrying the story forward by telling of the proposals for reform and the way in which they have been carried out.

But if a great work was to be sacrificed to material considerations, it would have been impossible for the melancholy task to be performed more skilfully than it has been by Professor Eastwood.

The only criticism which we venture to make relates to his handling of equitable interests under the modern law. His section on that subject between pages 66 and 87, admirable within its limits, does not go far enough. A beginner would find it very useful to have the various possible kinds of equitable interest classified and illustrated. And it ought to be explained to him here what is meant by overreaching an equitable interest, that there are some equitable interests which any estate owner can overreach if he uses the right machinery, others which no estate owner can overreach, and others which can be overreached in certain circumstances and not in others.

And, in view of the very large part which the trust for sale plays in the new legislation, we think that something ought to be said about its history and use before 1926. It was a deficiency in the earlier editions that this institution was almost ignored. In the twenty-third edition there is one reference to trusts for sale in the index, and that is to an explanation in a footnote of the notion of equitable conversion. Trusts for sale seem to have played a much larger part in practice than

is to be inferred from the reading of text-books and cases. Indeed, a student must search at some length for any comprehensive account of them. And yet the device of vesting a legal estate in trustees for sale, with power to postpone sale, where the settlor very likely has no intention that the land shall be sold, but has the attainment of other objects in view, was an anomaly which deserved elucidation.

The new Williams will have to meet the severe competition of other books wrestling with the problem of presenting the modern law in a manner that shall combine readability with scholarship. But in the hands of its accomplished editor it will hold its own.

H. A. H.

Snell's Principles of Equity. 19th edition. By H. G. Rivington, M.A., and A. C. Fountaine. Sweet and Maxwell, Ltd. 1925. 8*vo*., liii and 652 pp. 30*s*. net.

In most cases it is a difficult ask to criticise the nineteenth edition of any work of repute. The task is doubly difficult in the present case, as the successive editions of Snell's Principles are widely known for their merits in general and their accuracy in particular.

What more particularly calls for remark in connection with the present edition is that the new wine of the real property statutes of 1925 has been poured into the old bottles of the text of the book. Necessarily this involved substantial amendment of the text, and the editors are to be congratulated on having accomplished this task in so admirable a manner. Apart from the general amendment of the text, a separate and well-written chapter has been devoted to equitable estates, priorities and assignments. In spite of these changes, the bulk of the book has been increased by not more than thirteen pages.

It is a pity that the edition had gone to press before the passing of the Judicature (Consolidation) Act, 1925, and the Guardianship of Infants Act, 1925. The latter makes such important changes in the law that its omission should be noted; but some short account of these changes have been inserted by way of 2 pages of addenda facing p. 398. This edition, as in the case of previous editions, should prove of incalculable assistance not only to students preparing for the Bar or Solicitors' Final, but also to practitioners.

D. B.

The Law of Property Acts, 1922-1925, with index and tables by HUGH POLLOCK. The Solicitors' Law Stationery Society, Ltd. 1925. pp. 809. 25*s*.

This book presents under a single cover the text of the new property statutes, eliminating the repealed parts of the Act of 1922, incorporating the amendments of 1924, and adding the still operative sections of the Trustee Act, 1888, and the Married Women's Property Acts which touch upon conveyancing matters.

The tables correlate the new legislation with the repealed and the reenacted, section for section; and this, the only original portion of the book, is a really excellent and useful piece of work. It is in fact a compendium of the Acts which is already very widely used in Lincoln's Inn.

The book is well printed and indexed. We note two misprints in the Table of Contents.

H. E. S.

Principles of the Law of Personal Property. By the late JOSHUA WILLIAMS, Q.C. Eighteenth edition, by T. CYPRIAN WILLIAMS, LL.B., one of the Conveyancing Counsel to the Court, assisted by W. J. BYRNE, B.A. Sweet & Maxwell, Ltd. 1926. £1 10*s*. net.

A work which has been a guide, philosopher and friend on the topics with which it deals to many generations of law students and has now reached its 18th edition, hardly needs any fresh recommendation by a reviewer. Every one will regret that Mr. Cyprian Williams was unable, through illness, to complete the revision of the present edition, but he has been fortunate in securing the assistance of an editor of skill and experience in Mr. Byrne. Owing to the great mass of legislation enacted since the 17th edition was issued in 1913, quite apart from the new Acts of 1925, affecting the law of property, the task of preparing this edition has been one of great difficulty. A careful perusal of the book enables us to say that it has been discharged with great care and skill. The only criticism that we desire to offer is that the editors do not appear to have recognised the desirability of reducing the great bulk to which the work has grown in successive editions. It is, of course, intended for use both by students and practitioners, but its suitability as a text-book for the former class is much impaired by its size; and, in view of the fact that practitioners will obviously resort to more specialised works on particular topics, it appears to us that much of the detail of such subjects as ships, insurance, bankruptcy, patents and the like, might with advantage be abridged, with the object of reducing the book to more manageable proportions.

D. T. O.

Sir Benjamin Cherry's Lectures on the New Property Acts. The Solicitors' Law Stationery Society, Ltd. 1926. pp. 191. 6*s*.

The only lectures on the Property Acts which, in our opinion, are worth while as lectures, are those which are given as a detailed illustrative commentary on the text of the statutes. Any such commentary must necessarily be much more diffuse and lengthy than were Sir Benjamin Cherry's. But, even if his hearers went away bewildered and despairing, his readers will be glad of his discourse. For obviously Sir Benjamin is more qualified to help us in our struggles than anyone else. The book is well worth buying by anyone who is willing to work seriously at the subject, and is prepared for an unpolished style. For the lectures have been printed as they were delivered, with interpolations as to the lateness of the hour, the duties of questioners, and the like, which, however appropriate in the lecture hall, tend to irritate in the study.

Lord Haldane, in four pages of preface, gives an account of the successive steps which led to the legislation, and of the part which Sir Benjamin played in its development. Since the day when Lord Haldane took the chair at the Committee of Lords and Commons—appointed by Lord Birkenhead as Chancellor—Sir Benjamin must have done more than the work of two men. The fact that he has found time and energy to help in the necessary teaching of old and young excites our respectful admiration.

H. A. H.

The New Property Acts. Lectures by A. F. Topham, K.C., to the Solicitors' Managing Clerks' Association, October-December, 1925. The Solicitors' Law Stationery Society, Ltd. 1926. pp. 157. 6s.

The mass of the new property laws has spread dismay not only among students but also among experienced solicitors and their clerks, and even, if rumour may be credited, among the exalted of Lincoln's Inn. Mr. Topham then was facing a formidable task, even for a lawyer of his distinction, when he consented to give this series of lectures. The fact that he had been closely associated with the reforms from their inception lends an added weight to his words, and the reader is comforted by the thought that for him the new law has few terrors; it is not that he makes light of the many difficulties that are bound to arise in practice, he meets and explains them, and shows how the Acts may be expected to work.

The professor of law addressing students at a university is not concerned with the details of practice; his duty is to explain, first,

the theory of the pre-1926 law, and then the theory of the new order. Mr. Topham was dealing with the same material from a different angle. His audience consisted of managing clerks, and in their ranks are many very able lawyers, and still more who know the intricacies of the old law from the practical side as few practising barristers ever know it. It follows that the lecturer need not worry himself in explaining the old; he could take knowledge of that for granted, and could plunge at once into an exposition of the practical requirements of the Acts.

For those who are well versed in the old conveyancing these lectures are excellent, and there will undoubtedly be many who will be glad of their assistance. But the utility of the book for students must be doubted; it was not meant for them, and only a few can have acquired the necessary grounding.

M. E. R.

Hawkins on Wills. 3rd edition. By C. P. Sanger. Sweet & Maxwell, Ltd. 1925. pp. 414. £1 5*s*. 9*d*. post free.

Sanger on Wills and Intestacies. 2nd edition. By the author. Sweet & Maxwell, Ltd. 1925. pp. 220.

Gale on Easements. 10th edition. By W. J. Byrne. Sweet & Maxwell, Ltd. 1925. pp. 591.

No one will be disappointed in any of these books, new editions of which have been published since our last issue. Their appearance, in respect of both printing and binding, is of the quality which the publishers have led us to expect of them. Their matter needs no comment addressed to lawyers of any seniority, for Hawkins and Gale are in the same editorial hands as they were for their preceding editions, and Mr. Sanger has given us a new edition of his scholarly little book which should be a model for legal monographs.

It may be worth while to remark, for the benefit of students who have acquired the elements of property law and are in search of literature for more detailed study, that each one of the books deals with its subject not only authoritatively, but also in a masterly style.

H. A. H.

Gibson's Conveyancing. 12th edition. By H. Gibson Rivington, M.A., and A. C. Fountaine. "Law Notes" Publishing Office. 1925. pp. xcvi and 752. £2 net.

"Gibson's Conveyancing" has found a well established and well deserved place on the shelves of practising solicitors and students of the Law Society, for it has never failed, hitherto, to provide a clear and concise exposition of an intricate branch of law.

The twelfth edition has to incorporate the new Acts, and is inevitably more bulky. It would doubtless meet a grievance of students if they could henceforth begin their study of Real Property and Conveyancing from the starting point of 1925. Such a course would also be a relief to editors of standard works; but it would be at the expense of the most prominent feature of English jurisprudence—its evolutionary character. And so the present editors have wisely retained the framework and the bulk of the matter of former editions, while incorporating with great care those provisions of the new Acts which affect conveyancing. An introductory chapter which explains the general effect of the statutes on conveyancing is most helpful.

We note that in citing authorities in connection with section 9 of the Bills of Sale Act, 1882, the device has been adopted of using the middle of a page for the imaginary "border line" (so often referred to in legal argument), and of marshalling the decided cases on either side of it. This is a form which is welcome alike to practitioner and student, and might well be more extensively used on appropriate occasions in other legal works.

The index and annotation are as reliable as the text of this most useful book.

R. M. H.

A General View of the Law of Property. Seventh edition. By J. A. Strahan, M.A., LL.B. Stevens & Sons, Ltd. pp. xlii and 483. 16*s.* net.

With the advent of the Law of Property Act, 1925, writers of text-books on property law were faced with the need for revision. "Tempora mutantur, lex et mutatur in illis" might be the motto of the new edition of his work, compiled by Mr. Strahan to incorporate the new legislation. In his first edition in 1895 Mr. Strahan adopted the method of treating the law of property as a single topic, and he was universally criticised. Behold him to-day justified in his prophecy that the law of personal property would "eat up the law of realty."

Mr. Strahan writes with the pen of a conveyancer, and the work is practical rather than academic. There are instances of ill-proportioned

treatment of topics, for example the excess of detail as to the regulations for the registration of land. But the work may be recommended, in particular to Bar students, as clear, concise and readable, and it is especially valuable to those concerned with the Irish Law of Property.

C. R. N. W.

Some Aspects of Commercial Law. A lecture delivered at the London School of Economics by Sir F. Mackinnon. Oxford University Press. 1926. pp. 24. 1*s.* net.

It is not too much to say that these few pages merit description as a small legal classic. They are at once a model of what a legal lecture ought to be, and a triumph of workmanship, reasoned, documented and critical; in literary form graceful and humorous. The main contention that commercial law is in truth nothing but " a set of rules for the *construction* of the various contracts that are used by commercial people " is most suggestively worked out. The " increasing tendency in recent times to limit by legislation the freedom of commercial contracts . . . . and to lay down (their) terms . . . " is examined in the searching light of this conclusion; and it does not face the light very successfully. The draughtsmanship of the Sea Carriage of Goods Act, 1924, may, indeed, be said to wither under the ray. Judicial criticism of this analytical weight does more than illumine a topic of law and infuse it with a new interest. It must inevitably have its effect in Parliament and on the Bench.

The profession (and, it must be added, all " men of ability and learning " who value choice literary workmanship) owe a debt of gratitude to the Oxford Press and to the Senate of London University for giving Mr. Justice Mackinnon's lecture to the public in print.

H. E. S.

Carver's Carriage by Sea. 7th edition. By J. S. Henderson, assisted by S. D. Cole. Stevens & Sons, Ltd. 1925. pp. 1119 and cx. £2 10*s.* net.

Carver on Carriage by Sea is a classic and deservedly so; and, although since the first edition in 1885 there has been a constant output of judicial authority upon the subject, the main outlines of the treatise show little signs of obsolescence. For the most part the new matter has throughout the subsequent editions been harmoniously incorporated, and in this respect the present edition is no exception.

It is exceptional, however, in one respect in that it has been necessitated by the passing of the Carriage of Goods by Sea Act, 1924, "which," in Mr. Henderson's words, "may be said to have revolutionised the relationship of shipowner and shipper" in cases where it applies.

Mr. Henderson, possibly wisely, has not attempted any detailed discussion of the many difficulties which some commercial lawyers at any rate anticipate will arise from the form and draughtsmanship of the Act, but has contented himself with a general summary of the effect of the Act in sections 32 and 76a and with many references to its provisions in appropriate places throughout the text and notes, sometimes accompanied by a brief discussion. The whole Act is set out in an Appendix.

This treatment of the problem is probably judicious in itself and has certainly been judiciously carried out. Mr. Henderson may be excused for not embarking on the uncharted and unlighted seas of speculation. He has for the most part declined the office of pilot, and will, therefore, run no risk of steering his readers on to the rocks. On the other hand, possibly some will be stranded who might have escaped disaster with a little guidance.

He does, however, express quite a definite opinion on the fundamental question as to the effect of the Act upon the obligations which shipowners impliedly undertake by common law when he says in section 1 "the statutory basis of liability" contained in the Act and the Rules "is substituted for the obligations which hitherto a shipowner has impliedly undertaken," and in section 76a "In cases under the Act of 1924 there are apparently no additional implied obligations. . . . The carrier's express obligation instead of his implied obligation must be considered." This was certainly the intention of those who were responsible for the introduction of this legislation, and it is quite arguable that the legislature has succeeded in giving effect to this intention. Inasmuch, however, as the warranty of seaworthiness alone of the implied obligations has been specifically displaced by the Act, we would ourselves hesitate to subscribe to Mr. Henderson's proposition. We would prefer to regard the Act and the Rules not as substituting a new basis for the contract of carriage replacing the common law basis, but as forming a superstructure upon the old common law foundation. For instance, the carrier's obligation under Art. III, r. 2, to "properly and carefully carry . . . . care for . . . . and discharge" must, we think, depend upon the common law obligation to do these things. The matter is, however, highly controversial, and we await a judicial consideration of the problem with interest.

We have dealt so far only with the treatment of the Act of 1924. The rest of the new matter seems to be wholly satisfactory. The new cases are accurately cited and summarised and inserted in the right places. We are, however, surprised to find no single reference to any case reported only in Lloyd's List Reports. This publication from time to time contains reports of cases of importance which find no

place in the better-known series of reports, and should certainly not be neglected by those responsible for a text-book on the law of shipping. It is, perhaps, rather unkind to draw attention to the somewhat comic misprint in section 103g, where reference is made to the condition in the American Act that the shipowner shall exercise "due negligence." But we feel that the shade of Mr. Harter, of Ohio, will be uneasy until this is corrected.

W. L. M.

Outline of the Law relating to Bills of Lading. By G. H. Main Thompson, M.A. Stevens & Sons, Ltd. 1925. pp. 284. 12*s*. 6*d*. net.

It is not very easy to understand for what class of readers this book is intended. The lawyer has his "Scrutton" and his "Carver," two of the best text-books in the English language, which cover all the ground covered by this book, with a fullness to which this book hardly attempts to attain. The student, it may be, has not the time to consult these two standard works; but Mr. Thompson's book bears no indication that it was intended for students, and does not seem suitable for them. There remains the mercantile community; and it is true that the mercantile community do to a certain extent buy and use works on legal subjects which are not those which a lawyer would naturally refer to; but the selection of authorities for citation—and, indeed, the citation of authorities at all—make it improbable that it is the mercantile community for whose suffrages the author is primarily appealing.

The book consists of a rather haphazard summary of certain rules which the Courts proceed upon in dealing with Bills of Lading. We use the word "rules" advisedly in preference to "principles," for, on matters of pure legal principle the treatment is often blurred, and sometimes inconsistent. For instance, the treatment of the effect of a transfer of a Bill of Lading misses the clue to the whole matter, viz., that the transfer of the Bill of Lading is neither more nor less than the transfer of *possession* of the goods themselves; again, the position of a carrier, apart from exceptions and the way exceptions operate, is not adequately explained, and there seems an actual inconsistency between what is said at p. 88 and what is said on p. 127 as to a chartered ship. Much space is devoted, and properly so, to the Carriage of Goods by Sea Act, 1924. On this subject opinions notoriously differ; but it suffices to say that, broadly speaking, none of the portions of that Act which seems to puzzle Mr. Thompson puzzle us, and none of the portions which puzzle us seems to puzzle Mr. Thompson. And, surely, it is rather bold to say, as Mr. Thompson

does in his Preface, that "it has seemed unnecessary to consider exceptions which are not within the rules" in view of the slowness with which the Rules are likely to be given legal effect in other countries, and the innate conservatism of the majority of business men?

The choice of authorities seems in some instances curious, and that of the source from which they are cited still more so; and this last defect is not counteracted as it should be by the Table of Cases. Mr. Thompson, it must in fairness be said, has with great industry disinterred many authorities which are not those to which one is accustomed, and this is all to the good. But our impression of the book as a whole is that it is unsatisfactory.

J. R.

Porter's Law of Insurance. Seventh edition. By T. W. Morgan. 1925. Sweet & Maxwell, Ltd. pp. 587 and xxxix. £1 12*s.* 6*d.*

Since first published in 1884 this work has run into seven editions. This would seem to indicate that it has been found to satisfy a real need. Probably its popularity is due to the fact that it contains a body of miscellaneous information connected with insurance which is not readily accessible elsewhere.

We have not however found it to be a satisfactory work. We have searched in vain for clear statements of principle on different topics, and have found instead in most cases merely condensed citations from decisions of courts of varying judicial weight. These decisions, when verified, are found often to turn on the particular clauses of the policy, although no indication of this is given in the text. For instance, *Nichols* v. *Scottish Union*, 2 Times L.R. 190, is cited in support of the following proposition:—"*Mortgagor and Mortgagee insuring:* The assured being entitled to indemnity can only recover the amount of his loss. Thus where a mortgagor had insured the property in the mortgagee's name and again in his own name it was held that only a rateable proportion could be recovered from each insurer."

The decision in fact turned wholly on the construction of the condition in the policy sued upon and the rules of the mortgage society.

The important question whether motor car insurance against third party liability is void as against public policy in cases where it indemnifies the assured against the civil consequences of the criminal act of manslaughter is dismissed without discussion by the mere citation of the conflicting decisions of Bailhache J., in *Tinline* v. *White Cross Insurance Co.*, [1921] 3 K.B. 327, and of the Appellate Division of Ontario in *O'Hearn* v. *Yorkshire Insurance Co.*, 67 D.L.R. 735.

Again, *Hurst* v. *Evans*, [1917] 1 K.B. 352 should not be cited without some reference to the adverse criticism of this case in *Munro Brice* v. *War Risks Associations*, [1918] 2 K.B. 78.

The discussion on p. 259 as to the difference between average in fire and marine policies is definitely misleading.

Chapter XIII dealing with reinsurance must be read with great caution. No authority is cited for the proposition on p. 272 that though the assured is not privy to the reinsurance "the reinsurer's liability would be discharged by payment to the assured of the amount of his loss," and we do not believe it to be sound. Further, the statements as to the reassured's right to recover from the reinsurer the costs of unsuccessful litigation should be reconsidered in view of the decision of the Court of Appeal in *Scottish Metropolitan Assurance Co.* v. *Groom*, 41 T.L.R. 35.

Though on the whole the learned editor has shewn considerable industry in incorporating the new decisions, his discretion was surely at fault when he inserted under the heading of reinsurance the case of *Traders and General Insurance Association* v. *Bankers and General Insurance Co.*, [1921] 38 Times L.R. 94. This case is only an authority on the meaning of the "risks of leakage" in a marine policy, and it was a pure accident that the question was litigated upon a reinsurance policy.

W. L. M.

The Historical Foundations of the Law relating to Trade Marks. By Frank I. Schechter, A.M., J.D., of the New York Bar. Columbia University Press. 1925.

This is a dissertation submitted by the author for the degree of Juris Doctor at the University of Columbia, and forms the first publication of a projected series of "Columbia Legal Studies," intended to include such dissertations, accepted for the Doctorate, as are regarded as valuable contributions to legal science.

The present work undoubtedly merits inclusion in a series so described. It furnishes throughout evidence of extensive historical research, and the bibliography appended to the volume cannot fail to be of very great assistance to students of the subject. It contains a lucid and readable account of the development of the use of marks in connection with trade and manufactures from medieval times. As a contribution to the history of trade and other marks, the purposes for which they have been employed at various periods and of the customs which grew up relating to them, Dr. Schechter's work will take an assured position as a book of reference. But from the purely legal aspect, as a contribution to the solution of the questions stated at the outset of his essay, namely, the jural nature of the right in a trade-mark and the true basis of relief in trade-mark cases and cases of unfair competition, the work does not appear to be equally successful. He points out the different doctrines on these questions which have been adopted in modern times in the Courts both of England and the

United States, but adds little to the discussion of the relation of these doctrines to each other and of their respective applicability to the subject-matter which is not already to be found in the leading English books on the subject.

Dr. Schechter, at the commencement of his essay, quotes Dr. Jenks's remark that "there is, on some subjects, a touching absence of curiosity among English lawyers," and goes on to state that nowhere is this "touching absence of curiosity" more apparent than in the field of the law of trade-marks. Yet, judging by his bibliography, he must be well acquainted with the treatise on Trade Marks by Sir Duncan Kerly, and it is unfortunate, in face of the adoption of this somewhat artificial air of superiority, that as far as the development of the law for the protection of trade-marks is concerned, there is no early English case mentioned in this dissertation which has not been adequately dealt with in that well-known treatise.

D. T. O.

Outlines of Jurisprudence. By B. R. Wise, B.A., and Percy H. Winfield, LL.D. 4th edition. 1925. By David T. Oliver, LL.M. 157 pp. Thornton & Son. 4*s*.

This little book is not a cram book. The editor gives carefully a choice of definitions, and sets out different views, thus forcing the reader to think, and leaving him under the necessity of making a choice or of originating some opinion of his own.

The historical side of the subject has been very well developed. There is a brief discussion of the influence of religion on the development of law; and a useful outline of the history of precedents and law based on judicial decisions, showing how and why the judges decide new points of law as they arise.

The learned editor appears to have adopted whole-heartedly Austin's definition of intention. This seems to be a mistake.

Intention may be either present or future. If A shoots at B intending to kill him it is present intention. If A breaks and enters B's house with intent to steal it is future intention.

Austin analyses future intention well. He says that it includes (*a*) a desire for a certain result; (*b*) a belief that there is a chance of obtaining that result by acts; and (*c*) a belief that at some future time one will do those acts.

Present intention relates to the consequences of conduct. There must be a belief or expectation that such consequences will immediately follow the act or omission. This raises two questions: What degree of belief or expectation is required? Is any other element besides belief or expectation necessary?

Austin attempts to answer these questions in his xixth and xxth

lectures on Jurisprudence. He maintains that intention is purely a condition of belief or expectation, and that any degree whatever of belief or expectation is enough. If a person thinks that there is any chance, or any appreciable chance, of a certain consequence following his act or omission, he intends that consequence.

Austin illustrates his statement, but in every illustration that he uses he only considers *wrongful* conduct with belief in or expectation of certain consequences. Surely we can have innocent conduct with a belief that there may be a chance of a harmful consequence as a result of it. For instance, A gives B, a carrier, a tin of nitro glycerine to carry. A takes every precaution to prevent an explosion, and warns B of the dangerous nature of the package. A cannot help knowing that there is a possibility of an explosion. If it occurs, can A be said to have expected it? Yes, according to Austin; but Austin is mistaken, for he only looked at the question from one side—the wrongful conduct side. It is unreasonable to speak of intention in connection with a person who, although he contemplated the possibility of certain consequences happening, yet took every precaution he could to prevent their happening.

There must be some other ingredient required besides belief or expectation in order to constitute intention. That ingredient, it is suggested, is a desire for the expected consequences to happen. One might illustrate this point by cases dealing with responsibility for intended consequences. In *Peek* v. *Gurney* (1873) 6 H.L. 377, it was held that the directors had desired and intended to influence the public to buy shares directly from them, but that the false statements in the prospectus were not made to influence prices on the Stock Exchange; and, although the directors must have expected such inflation of Stock Exchange prices, yet, as they had not *desired* it, judgment. We may point out that neither of the editors have noticed they could not have intended it. In a later case, *Andrews* v. *Mockford*, [1896] 1 Q.B. 372, where the facts were similar, but it was shown that the defendant had issued the fraudulent prospectus with the desire to influence a wider circle than the immediate allottees, he was held to have intended all the consequences that resulted.

We might suggest a definition: Intention is a desire to produce a certain consequence by means of certain acts. The desire is coupled with such a degree of belief or expectation that the consequence will actually follow as is sufficient to cause the person to do the acts.

This is a most useful little book, and it will remain, as it has always been, of great value to the student. The learned editor's statements of various writers' opinions are very accurate; he has not merely collected, he has weighed; and his summaries are excellent.

H. B.

Der Versailler Vertrag und die Sanktionen. Von Dr. Conrad A. Wille. Verlag von Georg Stilke, Berlin. 1925.

This is an attempt, on the part of a German writer, at an appreciation from the point of view of International Law of the ill-famed sanctions of the Versailles Treaty, and of their application beginning with the occupation of German towns in March, 1921, and ending with the occupation of the Ruhr in January, 1923. It would, naturally, be too much to expect an account without bias, but it must be admitted that the author was at pains to preserve the scientific character of the monograph. His analysis of the conception and the nature of sanctions will certainly prove useful to the student of that highly undeveloped part of International Law connected with the performance of treaties of peace. His contribution to the interpretation of Arts. 17 and 18 of Annexe II, Part VIII, of the Treaty of Versailles is not without interest, and his account of Germany's attempt to solicit the intervention of the League of Nations contains an excellent exposition of Art. 17 of the Covenant of the League. It is, therefore, to be regretted that the author's excess of zeal prompted him to adopt the course of presenting extensive and contradictory arguments. There could be no objection against a line of argument intended to show the sincerity of the German endeavour to fulfil the treaty, or calculated to prove the futility of the French interpretation of the Treaty of Versailles. No formal objection can, on the other hand, be raised against the undertaking to base the case of Germany on the *clasula rebus sic stantibus* and on the original or supervening impossibility of performance. But it is, to say the least, difficult to adopt both arguments at once. The part of the book which deals with the nature and the irregularities of the French occupation is foreign to the main issue, as is also the rather imperfect presentation of the British attitude.

H. L.

A Treatise on Private International Law. By the late J. Westlake, K.C., LL.D. 7th edition by N. Bentwich, Attorney-General of Palestine. Sweet & Maxwell, Ltd. 1925. 27*s.* 6*d.* net.

A Concise Treatise on Private International Law. By J. A. Foote, K.C. 5th edition by H. H. L. Bellot, M.A., D.C.L. Sweet & Maxwell, Ltd. 1925. £1 15*s.* net.

The almost simultaneous appearance of new editions of these standard works on Private International Law furnishes cogent evidence of the increasing importance and rapid development of this department of English law. The last edition of the late Professor Westlake's

great work was issued only three years ago; but, in the interval, nearly 100 cases bearing on the subject have come up for consideration in our Courts, and there has been legislation of some importance, such as that effected by the Nationality Act of 1922. No edition of the late Mr. Foote's work had been issued since 1914, so that Dr. Bellot's task has been a very onerous one.

A notice of Mr. Bentwich's previous edition of Westlake appeared in the CAMBRIDGE LAW JOURNAL for 1923, and we need only add that the new edition maintains the same high standard of care and accuracy.

Mr. Foote's work deals with the subject mainly from the point of view of its evolution in decisions of the English courts and English legislation, and is, therefore, somewhat narrower in its scope than Westlake's classic treatise. In this way it has the advantage of greater simplicity, and is not so difficult for a student to master. It is undoubtedly the best book for English students who are beginning the study of the subject. In the preparation of the new edition Dr. Bellot has found it necessary to re-write certain portions of the work, and, in our opinion, has discharged his task with great skill and judgment. We may point out that neither of the editors has noticed the effect of the Administration of Estates Act, 1925, on the doctrine of *Birtwhistle* v. *Vardill*. It probably renders this obsolete for the future, except where land is allowed to descend under a limitation in tail.

D. T. O.

Analysis of Foote's Private International Law. By H. H. L. BELLOT, M.A., D.C.L. Sweet & Maxwell, Ltd. 1925. pp. 64.

In preparing a new edition of Foote, Dr. Bellot has thought fit to abstract the introduction and analysis into a separate small volume for students. In this cheap form it no doubt obliges many students who do not go to the original. We venture to think it is unfortunate to put the temptation to cram so directly in their path.

The analysis is concise and clear, albeit far from free of the inaccuracies of statement which almost inevitably dog the writer of legal précis. Thus on p. 8 we note the phrase "incorrect in exaggerating their absence." On p. 5 the Latin phrases and spelling stand in three places in serious need of revision.

H. E. S.

The Permanent Court of International Justice. By ALEXANDER P. FACHIRI. Oxford University Press. 1925. pp. vi and 342. 15*s.* net.

The Permanent Court of International Justice held its inaugural meeting on the 3rd February, 1922; it has already delivered no less than fifteen judgments and advisory opinions and has thus a substantial record of work to its credit. Mr. Fachiri is, therefore, not dealing with an institution which is untried, and about whose doings speculations would be the chief work of an author. He has given us a very useful piece of work, and one which will certainly be in the hands of all who may be concerned in any way with cases before the Court. The book deals with the Court's organisation, jurisdiction and procedure, and in addition to a very clear historical account of the steps leading to its creation, it also contains an account of the various cases which have come before it. There is a short chapter on the relation between the Court and the League of Nations, while the Appendix contains not only the operative documents such as the Covenant of the League, the Statute and Rules of the Court, etc., but also the various preparatory documents, such as the draft scheme of the Committee of Jurists and the various reports and amendments. The chapter on the Jurisdiction of the Court deals with various matters of great importance to the rightful understanding of its working; the parties, "states and members of the League," the meaning of "compulsory jurisdiction," and the advisory jurisdiction of the Court. It is much to be wished that this portion may come to the notice of those who appear to consider that the advisory side of the Court's jurisdiction detracts from its essential character as a court of justice.

The value of the Court in building up an International Common Law cannot be under-estimated, for though Article 59 of the Statute of the Court states that "the decision of that Court has no binding force except between the parties and in respect of that particular case," principles laid down and points decided must certainly contribute in no small degree to the development of International Law.

A. P. H.

The British Year Book of International Law. 1925. Humphrey Milford. Oxford University Press. pp. vi and 273. 16s. net.

When this series began six years ago, there was a strong presumption in its favour, for it was nothing short of a scandal that England lagged behind most other important countries in having no periodical publication relating to this branch of law. The high standard of the five preceding volumes has been maintained, and, quite apart from the general excellence of the articles, what may be called matter of record is very useful; such are the "Notes," the "Decisions of International

Tribunals," and of "National Tribunals involving points of International Law," "Bibliography," and "Summary of Events."

In the opening article, Dr. J. M. Spaight urges that, while International Law should recognise in air warfare the possible necessity for destruction of non-military property on a scale even greater than that allowed in land or in naval warfare, yet non-combatants in the vicinity of the attack ought to have at least the opportunity to provide for their own safety. How practical effect can be given to this qualification consistently with effectiveness in the attack is not stated. Professor Brierly analyses with his customary acuteness the meaning of matters "solely within the domestic jurisdiction" of a disputant state, and points out (what has usually been ignored) that, on any interpretation of the phrase, the majority of international disputes arise out of matters within such jurisdiction. Professor Corbett throws much needed light on that vague phrase, "sources of International Law." A welcome sequel to Mr. Malcolm Lewis's admirable article on the British self-governing dominions investigates the resolution of the Imperial Conference, 1923, with respect to the negotiation, signature, and ratification of treaties. Mr. Beckett discusses the foundation of criminal jurisdiction over foreigners and in some respects parts company with M. Travers. It is worth noting that this topic engaged the attention of at least two lecturers at the Hague Academy in 1925, an institution which earns a timely piece of propagandism from M. Van Kleffens. Sir Cecil Hurst, in arguing for an International Court of Piepowder, gives some striking figures of the intolerable delay in most international arbitrations, and quite rightly pleads for speedier means of settling pecuniary claims raising no political issues. As it is, the dust upon the suitors is that of stagnation, not of rapid travel. A long and careful discussion of the reasons given by Lord Balfour for the British rejection of obligatory jurisdiction in international disputes is undertaken by Professor P. J. Baker. "Ships of War as Prize" is a paper from the hand of Professor Pearce Higgins, whose great practical experience in Prize Law makes the article all the more valuable. Dr. McNair's essay on so-called state servitudes handles with skill and directness one of the most troublesome conceptions of International Law. Professor Garner recommends that state-owned vessels employed wholly for public purposes should be exempted from arrest, but that this exemption ought to cease where they are largely or exclusively employed as ordinary commerce carriers. Mr. Cleminson has an article on the draft convention, submitted to the International Law Association at Stockholm in 1925, dealing with maritime jurisdiction in time of peace.

There is but one thing lacking to the *British Year Book*. We do most earnestly ask the editorial committee to consider the feasibility of compiling a synthetic index, and we urge it the more strongly precisely because we use the series so frequently. A quinquennial one would have been a reasonable demand, but as that is now impracticable, let it be at least a septennial compilation.

P. H. W.

The Swiss Civil Code. English Version, with Vocabularies and Notes. By Ivy Williams, M.A., D.C.L., LL.D. Oxford University Press. 1925. pp. xliv and 287. 10*s.* net.

The Civil, or Private, Law of Switzerland was until half a century ago in the hands of the individual cantons and smaller divisions of the country. A Code of Obligations was enacted in 1881, and in 1898 the Federal Government was authorised by a referendum to unify the whole system of Private Law. A draft code was drawn up by Professor Eugen Huber of Berne University, fully discussed, slightly amended, passed unanimously by both Houses of the Legislature in 1907, and finally brought into force, together with a revised Code of Obligations, in 1912. It has received little attention outside Switzerland, partly because it is intensely rational, drawing far more on cantonal traditions than on foreign codes or the speculations of jurisprudence, and partly because it is so brief, so bare an outline, that many important questions are passed on, unanswered, to the judge. Unlike the Bürgerliches Gesetzbuch, it never sacrifices clearness to precision. The chief innovations concern the law of pledge and mortgage; the law of husband and wife, which is very favourable to the learned translator's sex; and the law of corporations, which gives full corporate capacity to all non-commercial societies, without requiring State concession or even registration.

Dr. Williams' translation is clear and usually exact, though her desire to use only familiar English terms is sometimes misleading: for instance, to translate "Die juristischen Personen" by "Corporate Bodies" is to ignore that interesting German institution, the Foundation or Stiftung. The "numerous commentaries," praised by the Swiss Federal Authorities, consist of a few essential and businesslike footnotes. It is to be hoped that Dr. Williams will soon give us a translation of the Code of Obligations, which, though historically separate, is both in practice and theory an essential part of the Civil Code.

P. W. D.

An Introduction to Roman-Dutch Law. By R. W. Lee, D.C.L., M.A., Rhodes Professor of Roman-Dutch Law, Oxford, etc. Second edition. 1925. Clarendon Press, Oxford. 20*s.* net.

The appearance of a second edition of Professor Lee's scholarly work will be welcome to students and teachers alike. The first edition was published in 1915 and speedily became recognised as the leading modern text-book on the subject. The need of such a work can only be fully appreciated by those who approached the study of the subject before the publication of this work. The great work of Grotius, the "Introduction to the Jurisprudence of Holland," published in 1631,

which had been the text-book on Roman-Dutch Law for many generations of students, like Blackstone's Commentaries in England, had become overladen with commentary. Van der Linden's "Handbook," published in 1806, excellent in itself as an elementary treatise and still useful as an authority on the latest phase of Roman-Dutch Law in its original home, naturally fails to meet the needs of students of that system in its later developments in South Africa and Ceylon. Van Leeuwen's elaborate work, from which the phrase "Roman-Dutch" appears to have obtained its vogue, and of which an excellent translation has been made by Mr. Justice Kotzé, is hardly suitable to beginners. The same may be said of the modern works by Mr. Justice Maasdorp and Dr. Nathan in South Africa and Mr. Justice Pereira in Ceylon, which are more particularly concerned with the law of their respective jurisdictions. Professor Lee's book has, therefore, supplied a long-felt want and, we may say, supplied in it such wise as to earn the gratitude of all students of the subject. The new edition has undergone most careful revision and incorporates the effect of all relevant legislation and decisions of the Courts in South Africa and Ceylon in recent years. It includes some new features which will be of great utility to students. In a series of dissertations, contained in Appendices C to K, a number of topics which have been the subjects of dispute and, in some cases, still give rise to questions of difficulty, are concisely but lucidly discussed, with ample reference to the authorities applicable. Appendix F (Limits of the *jus vindicandi*), Appendix G (Contract and *Causa*), and Appendix H (Stipulations for the benefit of a third person) may be particularly mentioned as worthy of careful study.

D. T. O.

Mews' Digest of English Case Law to the end of 1924. Second edition, under the general editorship of Sir A. Wood Renton, K.C., and S. E. Williams. Vols. I-VII. Sweet & Maxwell, Ltd., Stevens & Sons, Ltd., and the Solicitors Law Stationery Society, Ltd., 1925. Vol. I. Abandonment—Banker. pp. xxxiv and columns 1476. Vol. II. Bankruptcy. ix. and 1716. Vol. III. Barrister—Common. xx and 1828. Vol. IV. Company. ix. and 1766. Vol. V. Compensation—Costs xvi and 1674. Vol. VI. County—Custom. ix and 1600. Vol. VII. Customs—Ecclesiastical Law. xvi and 1964. Price 35*s.* per vol.

Messrs. Sweet and Maxwell and Messrs. Stevens have co-opted the Solicitors Law Stationery Society, Ltd., in the enterprise of publishing a new edition of "Mews," and the names of these three houses are a guarantee of first-class production. The India Paper alternative edition is a wise provision of which a great proportion of the profession will no doubt avail themselves. The clarity of the print loses nothing

thereby, while the reduction of bulk is a very real blessing in days when the Inns are crowded, and the practitioners' chambers in any event provide inadequate shelving space to cope with the increasing number and size of current legal publications. We do not hesitate, in passing, to advert to this problem. The Common Law puts forth annually an average of nine volumes of standard reports of the higher courts alone, and the mere physical bulk of the law is fast outrunning the ability of all but the pure specialist to keep abreast of it. In America the problem is even more pressing, and has called forth the efforts of the Institute of Law in editing and selecting authorities. Pending a greater measure of codification in England, encyclopædias and digests are indispensable, and the more their bulk can be reduced the better. Otherwise, a private library which makes any pretence to completeness will become beyond the reach of practitioners at large. We are accordingly grateful for the form and the excellent get-up of the present volumes.

The arrangement of the new edition closely follows that of the old. The annual supplements from 1897 to date have, of course, been incorporated. The aim of the work is "to place before the reader a miniature library of all the reports . . . . . by giving the head-note, that is, the pith and substance, of every decision that can be of any practical use to the lawyer." At the outset, therefore, reliance is placed upon that practised individual précis writer, the original reporter. It would be too much to ask, even in a co-operative work, that the accuracy of the head-note should be checked in relation to every case. But we might legitimately expect that the editors should reserve to themselves liberty to amend head-notes where they are notoriously misleading or insufficient.

The present editors have retained a number of obsolete cases for the very good reasons (1) that it is frequently important to ascertain the state of the law at earlier dates—as for example in the matter of title; (2) that many such cases are still law in common law jurisdictions where Westminster legislation does not prevail. The value of such cases to the legal historian, to the advocate basing an argument on the evolution of the law, and to him who practises before the Privy Council is also obvious. On the other hand, it is open to question whether the selection of retained cases is entirely judicious. The topic of custom, for example, to which much old law is still relevant, seems to have been a little capriciously treated in this respect. Leading cases, such as *Gateward's Case* 6 Rep. 59 b, *Dashwood* v. *Magniac* [1891] 3 Ch. 306, *Warrick* v. *Queen's College, Oxford* L.R. 10 Eq. 129, *Mayor of Saltash* v. *Goodman* L.R. 7 A.C. 655 are omitted, and it is difficult to envisage the conduct of an argument on prescriptionary custom without reference to them.

The division of the subject matter in such a work is of primary importance. English Law does not lend itself readily to classification, and the task of the compiler of a digest is a bewildering one. He may follow some system of juristic anatomy, or, at the other extreme, an

alphabetical one after the manner of the old Abridgments. He may be quite certain that whatever method he selects he will meet with reproach from some quarter. In all the circumstances, and until he has a legislative code to compel his steps, what better method can he find than to follow the general experience of the practitioners for whom he caters, with the addition of really exhaustive indices and numerous cross references? If this policy be carried through the work with determination and a high level of industry, the result will be a great blessing to the profession: not merely to the busy pleader, whose object is to collect a mass of references at short notice; but also to the inexperienced beginner who is groping "to find his law" and to overlook no important authority.

The first seven volumes are a prophecy that the completed work will meet these requirements with skill and judgment. It is essential that the compilers and editors of a digest should be men of wide, practical experience. The name of Sir A. Wood Renton, sometime Chief Justice of Ceylon, speaks for itself in this behalf, and Mr. S. E. Williams, of Lincoln's Inn, is with him. These early volumes do not suffer by comparison with the English and Empire Digest. It is true that the latter is correlated with Halsbury's Laws of England; but on the other hand, the grouping of topics in Mews is wider, with the probable consequence that the isolated or buried case will be more quickly unearthed. There must be a high proportion of lawyers who will thankfully receive the new Mews instead of or in addition to the Empire work.

As to the correlation of topics, it is of course impossible to collect under a wide title such as company or contract "every decision that can be of any practical use to the lawyer." Clearly the sub titles of contract must unburden the principal heading of a great proportion of the material. The editors have overcome much of this inherent difficulty by a fairly satisfactory cross index at the top of each title. We suggest that this method should be pushed further in the next edition.

The index volumes are not yet published, but upon their excellence and fulness will depend the efficiency and the ease of reference which will make the ultimate criterion of the whole. With these reservations, which are more truly only pleasant anticipations, we commend this edition of a tried and reliable work to the profession and to legal scholars alike.

H. E. S.

A Bibliography of English Law to 1650, *including Books dealing with that Period, printed from* 1480 *to* 1925. Volume I of The Complete Law Book Catalogue. Compiled by W. Harold Maxwell. Sweet & Maxwell, Ltd. 1925. pp. xvi, 444. Price 12*s.* 6*d.* net.

Mr. Maxwell has compiled this bibliography almost entirely from catalogues, including the valuable catalogue of the Library of the Harvard Law School. He does not claim that it is complete, but he

expresses the hope in his preface that he has omitted no work of importance printed before 1650. He has made an attempt to list every edition of the books included.

At the beginning of the volume the compiler has inserted a list of the printers of law books in the fifteenth and sixteenth centuries, with the approximate dates of printing, and also a chronological table of the principal sources of law from Anglo-Saxon times down to 1500. He has also included lists of bibliographies, dictionaries, glossaries, works on palæography, general histories of law, and similar aids to the explorer in our legal literature. The main part of the work consists of thirty chapters with titles such as "Anglo-Saxon and Norman Law," "Civil and Crown Pleas," "Public Records," "Constitution," "Sorts and Conditions of Men," "Common Law," "Courts and Procedure," "Property," "Statutes," "Scots Law" and "Irish Law." In the chapters on "Maritime Law" and the "Law Merchant" a number of Continental authors have been included. While the compiler has thus classified the books under subjects, and not arranged them alphabetically under authors, he has given at the end of the volume an alphabetical index of authors and subjects which will facilitate the work of reference. It is to be observed, moreover, that under each subject and sub-subject in the body of the book he has adopted an alphabetical arrangement of the several titles. In itself this general plan of classification is excellent. As followed by the present compiler it has, however, one unfortunate result. Books published before 1650 and books dealing with that period published between 1650 and 1925 are all placed together alphabetically. A better arrangement would be to place the books published before 1650 in one group and those published in later years in a second group. By such a division the bibliographer and the legal researcher would be able to distinguish the bibliographer and the legal researcher would be published before 1650—and the later literature. At the same time it is true that there is a certain advantage in having all the books under each heading grouped together. No doubt this advantage was in the compiler's mind.

The publishers announce that two further volumes are being prepared. One of these will contain the law books published between the years 1650 and 1801, the other will give those printed in the nineteenth and twentieth centuries. Judging from the first volume one may predict that the complete work will be a worthy successor of Worrall's *Bibliotheca Legum* (1731; last edition 1788), Bridgman's *Legal Bibliography* (1807), Clarke's *Bibliotheca Legum* (1810, 1818), and Marvin's *Legal Bibliography* (1847). Detailed comment upon the present three-volume work must be reserved till later, when one will be able to examine the second and the third as well as the first volume.

For the present it is sufficient to observe that Mr. Maxwell has compiled the first volume with much care and thoroughness. It is true, as he remarks in the preface, that a legal bibliography to 1650 requires, if it is to be fully satisfactory, the hand "of a lawyer with considerable knowledge of early legal history and with access to the books them-

selves." But, at the same time, lawyer-compilers of such works are very difficult to find. It is most satisfactory that a layman has not hesitated to enter the field and to present us with a bibliography that will be useful to many classes of persons, including practising lawyers, law teachers and legal researchers. Mr. Maxwell's book should now be added to Dr. Winfield's list of booksellers' catalogues that are" helpful in the matter of editions and are carefully classified " (*see* Winfield, " Chief Sources of English Legal History," 1925, p. 40). The present volume is, in fact, a bibliographical guide of much utility. It should be used by every person engaged in the study of the earlier periods of the history of our laws and institutions.

H. D. H.

Stephen's Commentaries on the Laws of England. Eighteenth edition, thoroughly revised and modernised under the general editorship of Edward Jenks, Esq., M.A., D.C.L., Professor of English Law in the University of London. 4 vols. Butterworth & Co. 1925. £6 6*s.* 0*d.* net.

Blackstone's " original plan " of a course of lectures on the Laws of England "took its rise," as he himself has told us, "in the year 1753." The substance of the lectures, which he delivered at Oxford, was embodied in the famous *Commentaries on the Laws of England*, first published in four volumes in 1765-1769; and before the commentator's death in 1780 his work, the first connected account of the English legal system to appear since the publication of Coke's *Institutes*, was revised in several editions under the care of the author himself. After Blackstone's death the *Commentaries* entered upon a new period of their history. Apart from adaptations, abridgments and foreign editions, fifteen English editions, prepared by prominent lawyers, made their appearance, the last one being that of Hargrave, Sweet, Couch, and Welsly (1844). A third stage in the history of the work began when, over eighty years ago, a large part of the learning of Blackstone and his editors was adopted by the late Judge Stephen and embodied in the first edition of his *Commentaries on the Laws of England* (1841-1845). Since that time the " Stephen," avowedly based on the " Blackstone " of earlier times, has passed through many editions. The seventeenth edition, under Dr. Jenks' general editorship, appeared in 1922; the eighteenth edition, again under the same editorial direction, issued from the press towards the close of 1925. It is this last edition of the " Stephen " which now calls for comment.

The reader of the new edition should recall the fact that in the seventeenth edition (1922) Dr. Jenks and his co-editors made important changes in the form and substance of the work. They abandoned Stephen's arrangement of subject-matter and reverted to Blackstone's,

a change which has called forth Dr. Winfield's remark that "Blackstone's ghost still haunts the arrangement of the current [1922] edition of Stephen's *Commentaries*" (*Chief Sources of English Legal History*, 1925, p. 339). The editors did not hesitate, moreover, as they explained in the preface, to be "ruthless modernists in matter." They gave up "the attempt, becoming more and more difficult with each succeeding edition of 'Stephen,' to identify and distinguish the passages from Blackstone's work which survive, in substance or literally, in its successor." They not only re-wrote "a large part of the contents of the last [1914] edition of Stephen," but they also re-cast "Blackstone's phraseology in modern terms." They omitted Blackstone's Introduction to the work and substituted one written by Dr. Jenks; and in place of Blackstone's Conclusion, on the "rise, progress, and development of the Laws of England," they inserted a new chapter on that subject by Dr. Jenks.

In the 1925 edition these radical changes have been, for the most part, retained; and, as the general editor has stated in the preface, the main work of the editors has been to incorporate in the *Commentaries* "all important changes in the law (whether material or formal) which have been made since the last edition was published" in 1922. Volume I. contains Dr. Jenks' Introduction (pp. 1-98) and Book I. (Public Law), revised by Mr. Landon. Volume II., which embodies Book II. (Law of Property), has been subjected to extensive revision by Dr. Jenks; and in this labour he has been assisted, in respect of two chapters, by Mr. Danckwerts, and, in respect of another chapter, by Mr. Stewart Wallace. Dr. McNair is responsible for the revision of Volume III., which contains Book III. (Law of Obligations and Civil Procedure). Volume IV. has for its contents Book IV. (Crimes and Criminal Procedure), revised by Mr. Gattie, and Dr. Jenks' Conclusion (pp. 491-539). Mr. Hughes-Parry has also shared in the preparation of the edition, for he placed at the disposal of the editors his knowledge of the details of what Dr. Jenks justly describes as "the vast new body of legislation.' A note on authorities is placed at the end of each chapter of the work; while a consolidated index to the *Commentaries*, filling one hundred and twenty-three pages, is to be found at the end of Volume IV. Many of the notes on authorities might be made more serviceable by the inclusion of references to a greater number of recent writings, such as articles in legal periodicals. It is regrettable that the work does not contain a complete table of the cases and statutes considered in the work. But one must not forget that the Stephen is primarily intended for the use of students; and all of the gentlemen who have taken part in the preparation of this edition deserve the hearty thanks of students, more especially articled clerks reading for the Solicitors' examinations. Painstaking and scholarly labour has produced at an opportune time a critical recension of an important institutional treatise. The reader will agree with the editors that Stephen has been "thoroughly revised and modernised and brought down to the present time." Indeed, so thorough has been this labour of revision and

modernisation that the present editors might well be justified in publishing future editions under their own names, with due acknowledgment of the earlier and basic work of Blackstone and Stephen and the many other lawyers who have modified the original text of the *Commentaries* of the first Vinerian Professor. Blackstone's original text, the text as he left it at his death, is one of the classics of our legal literature; and, as Dr. Winfield remarks in his recent work, *The Chief Sources of English Legal History*, there is " no other book on English law as a whole which can be put in the hands of a layman in the hope that it will not be tossed aside with a yawn after reading a dozen pages of it." Stephen's original text, the text as he left it at his death, even though it was largely an adaptation of Blackstone's work, is also to be regarded as one of our legal classics. The student who desires to read his Blackstone or his Stephen, in their pure and untouched form, must take from his shelves the editions for which these two jurists were themselves responsible. From the current edition of Stephen's *Commentaries* he will gain no true conception of either Blackstone's or Stephen's contribution to legal learning; for, as the extracts from the works of the Roman classical jurists embodied in Justinian's Digest were buried beneath the mass of the writings of the glossators and post-glossators, so the remnants of Blackstone and Stephen still remaining in the *Commentaries* have been hidden from our view by the revisions and recastings of many sets of editors. What we now value in the " Stephen " is in large measure the work of Dr. Jenks and his co-editors.

The student who is called upon to peruse the four volumes of the new Stephen could not do better than to read, at the outset of his study, the " Introduction " and the " Conclusion " to the entire work; for these two contributions, written by Dr. Jenks in the spirit of the great commentator himself, give the reader an admirable survey of the historical development and the systematic arrangement of the English Law. That part of the Stephen which deals with " Public Law " embraces many diverse topics. In comparison with most Continental systems English Law has never yielded itself very easily and gracefully to the juristic distinction between public and private law; and yet there are certain branches of the English system, such as constitutional law, criminal law, and the law of procedure, which may properly be regarded as falling under the head of public law. Some of the miscellaneous topics in the Stephen's " Public Law," such as family law, would hardly be regarded by most continental jurists as belonging to public law; while there are certain branches of public law in the continental sense, such as criminal law and procedure and the law of civil procedure, which find no place in the " Public Law " of Stephen's *Commentaries*, being reserved for treatment in other portions of the work. Both Dr. Jenks and Mr. Landon are fully aware of these and other difficulties incident to the classification of subject-matters (*see* Vol. I, pp. 77-100); and the point need not be further stressed. Let us observe merely that Mr. Landon has carefully revised the " Public Law," which is devoted to constitutional law, ecclesiastical law, associations of persons, family law, local

government, and certain "miscellaneous branches of public law," such as education, poor law, national insurance, ways and communications, the licensing laws, public health, lunacy and mental deficiency, the registration of the people, and the legal profession. One would like to have found a somewhat fuller consideration of the Constitution of the Imperial Commonwealth, with references to the main works, such as those of Hall, Borden, and Eastwood, which deal with "Dominion status" and similar topics; but one cannot expect to find everything in a work for students. Indeed, as Dr. McNair has reminded us, Stephen's *Commentaries* are, in fact, a "compression" of the law for students' use (*Cambridge Law Journal*, 1923, p. 397). Hence, although Dr. McNair has subjected the "Law of Obligations and Civil Procedure" to a revision which is both searching and exact, one is not disturbed by the fact that he has been unable to refer to all the recent cases that bear upon his subject-matter. Thus, in the case of *British and Benington's, Ltd.* v. *North Western Cachar Tea Co., Ltd., and Others*, [1923] A.C. 48, to which no reference can be found in the new edition, one of the two points which arose for argument was as to the right of a contracting party, who has repudiated the contract upon the ground of an alleged breach by the other party, to justify that repudiation upon the ground of other breaches by that other party. The case embodies a careful consideration of the effect of *Braithwaite* v. *Foreign Hardwood Co.* [1905] 2 K.B. 543; and, indeed, as a writer in the *Cambridge Law Journal* (1923, p. 355) has already observed, its chief importance lies in Lord Sumner's criticism of *Braithwaite's Case*. In general, Dr. McNair deals adequately with all matters of current legal interest. Thus, he considers briefly the Carriage of Goods by Sea Act, 1924, and refers to carriers by air. "The carriage of goods by air," he remarks, "is usually embodied in a special contract; but there appears to be no reason why a carrier by air who satisfies the conditions of a carrier by land, already discussed, should not, in the absence of special contract, be subject to the liability imposed by the Common Law upon the latter." Students of the case of *In re Polemis and Furness, Withy and Co.* [1921] 3 K.B. 560, which has given rise to so much discussion (*see, e.g.*, Salmond's *Law of Torts*, 1924 ed., § 36, and Dr. Winfield's comments upon it in *Cambridge Law Journal*, 1924, p. 128), will be interested in Dr. McNair's remarks (Vol. III., pp. 296-298); and they will agree with him in the statement that the task of attempting to reconcile the earlier decisions with the *Polemis* case, or to do away with them by means of it, "would not be profitable in a work of this nature." The nature of Stephen's *Commentaries* has also dictated to Mr. Gattie the scope of his revision of "Crimes and Criminal Procedure." He deals with many of the recent authorities; and he refers to some of the late additions to the literature of his subject, as, for example, Dr. Winfield's *History of Conspiracy and Abuse of Legal Procedure*, published in the series of "Cambridge Studies in English Legal History."

Dr. Jenks was faced by a task far more difficult than that of any one of the other editors of the present edition; for it was he who came under the obligation of adapting the "Law of Property" to present-day needs. Owing to the vast changes effected in this branch of the law by the new statutes of 1922-1925 Dr. Jenks has practically re-written the volume, which now stands as a record of his patient and scholarly labour. Although the learned General Editor of the *Commentaries* has not yet given us a new edition of his own *Modern Land Law* (1899), which is much needed, he has presented us with an adaptation of one of Stephen's volumes which will be of great service to the students, teachers, and practitioners who are now called upon to learn the "new law of property." All such persons will do well to ponder over Dr. Jenks' remarks on the significance of the new legislation (*see* Vol. I., pp. vii-ix). He holds, rightly, that the new statutes do not confine themselves to the machinery of conveyancing, but that they go far towards a revolution in the substantive law of property. He also maintains, with complete justification, that the new legislation has not rendered a study of the history of property law unnecessary. As Dr. Jenks says, "it is impossible to understand any part of English Law (least of all the Law of Property) without knowing something of its history. . . . And, as before 1926, so after, he will be the soundest lawyer and the most intelligent practitioner who remembers that 'the roots of the present lie deep in the past,' and that, for good or ill, English Law is based on the secure foundations of the rock of history. Could it be otherwise in a system which accepts the doctrine of judicial precedent as one of its cardinal principles?" Dr. Jenks' volume illustrates in a practical way his faith in legal history; for he has so deftly interwoven the old and the new laws of property that the reader realises at once the necessity of understanding the historical foundations of the Law of Property Act, 1922, and the great consolidating acts which have followed it. Not all of Dr. Jenks' views as to the practical effect of the new legislation (*e.g.*, Sects. 2 and 3 of the Law of Property Act, 1925; *see* pp. 99-102, and compare *The Law Journal*, November 14, 1925, p. 930) will be universally accepted by members of the profession. But this need occasion no surprise, since legislative changes so extensive and complicated are bound to give rise to diverse opinions.

Certain reflections come to the one who has read the four volumes of the new Stephen and placed them upon his study shelves for future reference. If the reader be experienced in editorial work he will recognise at once the difficulties incident to the revision and partial re-writing of an institutional treatise which fills well over three thousand pages; and he will feel impelled to congratulate the learned editors upon the successful completion of their task. He will be especially grateful to Professor Jenks, the General Editor, for the time and effort he has so well spent; and he will hold the thought in his mind that as institutional writers Blackstone and Stephen have a successor in our own time whose name will always be linked with theirs. Nor will the reader of the new Stephen fail to reflect that a competent scholar, endowed with a sense

for textual and legal criticism, might reconstruct our legal history from the middle of the eighteenth century to the present day by a long and patient study of the successive editions of Blackstone's and of Stephen's *Commentaries*. These successive editions, with their revisions, recastings and re-writings, mirror the progress of the law from Blackstone's time to our own; and since Blackstone was indebted to Hale and other juristic predecessors, the editions of the *Commentaries* also picture for us still earlier periods in the history of our law. It is possible that a further reflection may come into the mind of the one who reads the Stephen in its present form, a reflection not unlike the remark of Anatole France, in his review of M. Gazier's *Dictionnaire Classique*, that "originality is perhaps rarer and more difficult in matters of teaching than in anything else." The present Stephen is a "matter of teaching." Its form is not entirely new, for it is largely Blackstone's; its structure is not entirely new, for much of it is the structure erected by successive generations of writers and editors; its spirit is not entirely new, for it is much the same as the spirit of the early commentators who desired to see, in a broad and comprehensive way, the entirety of the English Law. But, although the Stephen of 1925 owes so much to the Blackstones and Stephens of earlier times, it contains, nevertheless, strains that are original, strains that are due to the thinking and the legal and literary workmanship of the present editors. There is, moreover, a further reflection that arises in the mind of the reader. It is desirable that the student gain a clear conception of the fact that the present laws of England are all intimately related to one another, that they form a system of civil and criminal justice which has grown out of the past and which is constantly evolving new rules and principles to meet the ever-changing needs of life. The thoughtful and intelligent student will derive such a conception from a reading of Stephen's *Commentaries* in the form which Professor Jenks and his co-editors have given them. This is not the least important of the benefits conferred on the student by a scholarly survey of the English laws of our own day. Until some modern Bracton, Coke, or Blackstone composes for us a new treatise of institutional character, the Stephen, still further revised from time to time, will continue to hold its own special place in the literature of our law.

H. D. H.

Hanson on Death Duties. Seventh edition. By F. H. L. Errington, M.A. 1925. Sweet & Maxwell, Ltd. pp. lviii and 638. 35*s.* net.

A Handbook of Death Duties. By H. Arnold Woolley, Solicitor. 1926. T. Fisher Unwin and The Solicitors Law Stationery Society, Ltd. pp. 150. 7*s.* 6*d.*

The two books before us treat the same subject from different angles, and are in themselves of a totally different standing.

"Hanson" is now well established as one of the leading practitioner's books on the subject, and can justly support the description of a first-rate treatise. It is remarkable that a new edition has lain so long in the womb of time. It is quite certain that the extension since 1911 of the scope of death duties had caused uneasiness to laymen during their lives and to their personal representatives in the subsequent event. Anxious clients and ingenious advisers may well have longed for an up-to-date edition of Hanson. From this point of view we should say that the Finance Act of 1914 alone would have at once provoked and justified the republication. The only criticism we have to offer in regard to the timeliness of the 1925 edition is that after fourteen years it might have been well to wait a little longer and incorporate the effect of the Law of Property Act and the Land Charges Act, 1925. The Editor says, however (at p. iv), that they "make no change of substance"; and this was a correct prognostication; although the Finance Act, 1925, greatly increases the rate of Estate Duty. The work is thoroughly well revised; the new statutes are incorporated to the precise extent of their relevance, so that Part II (the bulk of the work) forms an almost complete and extremely useful annotated code of the law of death duties. The introductory chapters on Estate, Legacy and Succession Duties respectively make an admirable summary of the topic. Mr. Errington, as might have been expected, has produced a conscientious and valuable edition.

Mr. Woolley's book is a new venture of much less bulk and pretensions. It is designed for solicitors as a convenience for first-hand reference. It incorporates the new statutes up to 1926, and is thus, within its limits, completely up to date. It seems to us to be a useful practical book by a practical man. A topic of this kind necessarily benefits by being handled by an experienced solicitor. Chartered accountants and laymen will find it clear and readable. We especially commend the statement of cases and the tables.

H. E. S.

Alpe's Law of Stamp Duties on Deeds and Other Instruments. Eighteenth edition. By A. R. Rudall and H. W. Jordan. Jordan & Sons, Ltd. 1925. pp. xxxviii and 385. 15*s*.

The seventeenth edition of this useful work was published in 1923. Since then there has been little change in the law of stamp duties, and the present edition therefore contains few alterations. The necessary references to the Finance Act, 1924, have been incorporated, and the decision of the House of Lords in *Baker* v. *Commissioners of Inland Revenue*, [1924] A.C. 270, is fully considered. If all books were as well indexed as this edition, much time would be saved.

B. F. M.

The Law of Income Tax. By E. KONSTAM, K.C. Third edition. Stevens & Sons, Ltd.; Sweet & Maxwell, Ltd. 1926. £2 net.

On the title page Mr. Konstam describes his book "as designed for the use of the Taxpayer and his advisers." The fact that the first edition was only published as recently as the year 1921 and that a third edition is called for in the year 1926, is sufficient to indicate that Mr. Konstam's design has been successful.

The clear and concise manner in which this complicated branch of law is dealt with in this volume enables not only practitioners but also everyone who has to deal with questions relating to income tax to grasp the principles on which the subject is based.

The present edition brings the law down to date and fully maintains the standard set in previous editions. All the most recent cases on income tax law and also the Act of 1925 are included and carefully dealt with. The number of cases dealing with questions of income tax which are continually being brought before the Courts for decision and the changes in the law which are constantly brought about thereby, renders it necessary that any book on this subject to be of use should fully deal with the most recent changes. These requirements Mr. Konstam fulfils.

Taking into consideration the way in which the Inland Revenue Authorities strive every year to draw the net more closely round the unfortunate income tax payer, a book to which the tax payer and his advisers can turn and ascertain, as clearly as the law allows, what his rights are, is of great importance to the community. Mr. Konstam has earned a debt of gratitude from income tax payers at large, by the way in which his book enables them to deal with exactions of the Authorities which might otherwise pass unchallenged. A perusal of his exposition on the various questions which must continually arise on this subject will enable tax payers to avoid the costs of unnecessary litigation by informing them as to their true position in regard to claims for tax made against them. Litigation with the Inland Revenue Authorities is not a matter to be lightly undertaken.

E. W. L.

Cases on Federal Taxation. By J. H. BEALE, LL.D., Royall Professor of Law, Harvard University, and R. F. MAGILL, J.D., Associate Professor of Law, Columbia University. Prentice-Hall, Inc. New York. $6.

Revenue legislation is essentially artificial, with the result that the revenue laws of the United States and of the United Kingdom present few points of direct contact. But it by no means follows that a collection of leading cases such as that of Messrs. Beale and Magill must fail to be of interest to English lawyers, if only from the point of view

of comparative jurisprudence. The field of inquiry is wider in the United States. In this country the Courts are exclusively concerned with problems arising out of the construction of statutes whose authority, as such, cannot be impugned. In the United States there constantly arises the preliminary question whether a statutory provision be *ultra vires* in the sense that it is repugnant to some fundamental principle of the constitution, and it is in this respect that the cases collected under the heading of Constitutional Aspects of the Taxation of Income are of the greatest interest as illustrating the important functions performed by the Supreme Court of the United States as a check upon the Legislature. Apart from the Income Tax, which it dealt with under a number of headings, the cases are grouped under the headings of Estate Tax, Gift Tax and Capital Stock Tax. A perusal of the cases makes it clear that the Courts in the United States, as in England, are becomingly increasingly occupied with the difficult questions of residence, agency and evasion of tax.

A. H.

Tax Diary and Manual, 1926. Prentice-Hall, Inc., New York.

This novel work may best be reviewed by a short extract from the publishers' description: "The Federal Government and all States impose severe penalties on corporations which delay in filing tax returns and reports. . . . It gives a digest of all the corporation, inheritance and personal income taxes required by each of the various States. . . . The 1926 Tax Diary and Manual shows by calendar date the exact day upon which each of the 1897 tax reports, returns and payments should be made." Taxpayers in England have small cause to rejoice, but the enumeration of our cousins' taxes may give us some small consolation! The diary is an exceedingly novel proposition, and no doubt of great use to business men. It provides a useful insight to the English practitioner into the position of the American tax payer at a time when a knowledge of the revenue systems of the two countries is becoming of increasing importance. Many fortunes are to-day invested on both sides of the Atlantic.

M. E. R.

The Law of Collisions on Land. By His Honour Judge R. O. Roberts and Andrew Dewar Gibb, LL.B. 1st edition. 1925. pp. xxx and 280. Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd.

A new and rather brief book on a very big subject; an increasing subject one might call it, particularly as each year sees a tremendous increase in road traffic, and very often vehicles are controlled—or

uncontrolled—by drivers so lacking in skill, common sense, and consideration, that collisions are increasing out of proportion to the statistics of former years.

There is a very good discussion of the law concerning negligence, carried along the usual conventional lines.

The learned authors fail to realise, or do not deal sufficiently with an important point in connection with negligence in collision cases. Possibly the abuse of the road may give us the only existing true example of contributory negligence. Since the rule in *Davies* v. *Mann* (1842) 12 L. J. Ex. 10, contributory negligence has practically ceased to exist. It all depends on who is bringing the action. *Butterfield* v. *Forrester* (1809) 11 East, 60, is the standard case on contributory negligence. Butterfield lost his action because of his contributory negligence. But suppose Forrester had sued for the damage to his scaffolding poles caused through Butterfield and his horse falling over them? Applying the Rule in *Davies* v. *Mann*, Butterfield certainly had the last chance of avoiding the accident. The case of *British Columbia Electric Railway Company* v. *Loach*, [1916] 1 A.C. 719, has probably given a further blow to the doctrine of contributory negligence by putting responsibility on the person who ought to have had the last chance of avoiding the accident.

If two people on the road are doing exactly the same thing—for instance, they collide through coming at a blind corner from different directions, both at the same speed and both in the middle of the road, then we have what appears to be a genuine case of contributory negligence. Let one of them be off side and the other not, or one within the speed limit and the other beyond it, or one stationary on the wrong side of the road, and the Rule in *Davies* v. *Mann* will apply. Result, there are very few cases of genuine contributory negligence.

The learned authors have pointed out clearly that contributory negligence is no defence in Criminal Law, and have proved it by numerous cases.

We suppose this book was written for the practising lawyer more than for the student; nevertheless, there is never any harm done by pointing out the values of remedies. The solution of the collision and road danger problem lies not in the civil action but in the criminal prosecution. The most dangerous people on the road are those who have nothing to lose by being defendants to an action. What is the use of suing the ordinary taxi-driver? Perhaps everyone who uses a car to any extent has been put off the road at some time by the reckless or drunken driver. He takes to the rough because it is easier to lift a car out of the mud than to disentangle it from another car; and, even though the other driver were capable of paying damages, one has considerably lessened one's chances of getting them by voluntarily leaving the road.

The Criminal Law is designed to handle this type of evil. It is not interested in one's going into the rough, it is only concerned with

punishing the person who was so inconsiderate as to cause him to go there. Its rules of evidence and procedure will protect anyone from being punished for another person's misjudgment or excitement. As to guilty persons, it effectively catches that type of person whose mind only reacts to something of the "fourteen days hard labour" variety.

As far as the remedy of damage is concerned, perhaps, in the end, the solution will be some form of compulsory insurance on those who take vehicles on to roads, against any injury they may cause to others. This would avoid the difficulty of the impecunious defendant.

The book is fair for its size. We should like it to be larger and more original.

H. B.

Law of Torts. By Arthur Underhill, M.A., LL.D. Edited by A. C. Hagon, B.A., LL.B. Eleventh edition. 1925. pp. lxx and 295. Butterworth & Co. 14*s*.

This is an excellent edition of a very useful book, and the editor has kept to the system used in former editions of teaching law from principles.

So many text-books fail to be really useful because of the involved style in which they are written. This book discusses the leading principles of the Law of Torts, one at a time; first setting out the principle, then commenting on it, and in conclusion illustrating it by decided cases whenever possible.

The sections on negligence and remoteness of damage are particularly well done, and the recent cases on remoteness are set out very clearly. Certain larger works on the Law of Tort could well take a lesson from this little book in this respect.

The editor makes some rather unnecessarily long excursions into the Criminal Law. It would be a help in the next edition if the dates of cases were to be inserted in the references in the footnotes to the text. This little matter makes a great difference in convenience to the reader.

H. B.

Law of Contract. By J. G. Pease and Philip A. Landon, M.A. 3rd edition. 1925. pp. lxiv and 360. Butterworth & Co. 14*s*.

A new edition of a book that had been out of print for far too long a time.

No doubt some teachers will regard this as a cram book. It would be much better to regard it as a glorified note book, a far better one

than a person is usually able to make for himself. Used as such and supplemented by notes taken in lectures, thus adding the very valuable personal point of view of the lecturer to the brief statement of the law laid down in the book, it becomes a useful, complete, and effective statement of the Law of Contract.

Most of the recent cases are mentioned, and have received adequate comment. There are one or two exceptions. For instance, on page 108, it is not advisable to class together *Foster* v. *Mackinnon* (1869) 4 C.P. 704, and *Carlisle and Cumberland Banking Co.* v. *Bragg* [1911] 1 K.B. 489, without showing that there was a difference between them. Mackinnon was a half blind old man who, without any negligence, signed a document that he had been told, and reasonably believed, was something other than it turned out to be. The jury in Bragg's case found specially that he had been negligent in not finding out that what he was signing was a guarantee. It might have been pointed out that the reason why Bragg was not held liable was that the primary cause of the Bank's loss was not Bragg's negligence but the fraud of the person who presented the supposed guarantee to the Bank.

On the whole it is a good edition of a valuable book. The system of teaching from principles is used throughout, and it is doubtful if one would not get just as good an idea of the Law of Contract from this sensibly written little book as from the more elaborate works usually recommended for study.

H. B.

Selected Cases Illustrating the Law of Contracts. By A. Cecil Caporn and Francis M. Caporn. Fourth edition. 1925. London. Stevens & Sons, Ltd. £1 5*s.* net.

Good print and discreet selection go far towards making any collection of cases acceptable. Both these requisites are pretty well satisfied by this book. If we miss some old favourites, no doubt there is good reason for their omission, and we can console ourselves with the inclusion of others which do not appear in Finch. Skilful annotation is a much more difficult affair, and we suggest that some reference to *Phillips* v. *Brooks*, [1919] 2 K.B. 243, might have been made at the end of *Cundy* v. *Lindsay*, and to *Drew* v. *Nunn*, (1879) 4 Q.B.D. 661, at the end of *Yonge* v. *Toynbee*. For a fourth edition there are too many errors, chiefly typographical, but the more noticeable because several of them appear in block capitals. Examples are "Gebaud" for "Gibaud" (p. 38); "Skinner" for "Skynner" (p. 74); "Brown" for "Broun" (p. 86); "*urberimae*" for "*uberrimae*" (p. 257); "Barly" for "Baily" (p. 514); "Atkins, L. J.," for "Atkin, L. J." (p. 527); "Blundell" for "Weld-Blundell" (p. 575); "Bust" for "Busk" (p. 595); "Bawder" for "Bawden" (p.

631); " Priest " for " Preist " (p. 763). *Spencer* v. *Hemmerde* (p. 542) lacks reference to any report, and on p. 39 a distinguished jurist is regarded as in the possession of a chair which he has ceased to hold for nearly a quarter of a century.

P. H. W.

Principles of British Constitutional Law. By Cecil S. Emden, M.A. 1925. Methuen & Co., Ltd. 7*s.* 6*d.* net.

Outlines of Constitutional Law. By Dalzell Chalmers, B.A., and The Hon. Cyril Asquith, M.A., late Fellow of Magdalen College, Oxford. Third edition. Sweet & Maxwell, Ltd. 1925. 12*s.* 6*d.* net.

Mr. Emden's treatise should be in the hands of every real student of Constitutional Law, and even those whose acquaintance with the subject is mainly directed to the practical purpose of meeting the requirements of law examinations will find it of great value.

Following a method which has the merit of being at the same time simple and original, the author investigates the functions appropriate to each of the great organs of government and then, in a series of chapters, discusses the relations of these organs to each other in their practical working in the British system.

The book appears to us to be singularly free from errors of type, but we notice that on pp. 9, 56, and 62 Mr. Plucknett's name is consistently given as " Plunknett."

" The Outlines of Constitutional Law," by Messrs. Chalmers and Asquith, is a work of a very different kind. It is frankly written as a summary of Constitutional Law for students preparing for examinations. It is admirably adapted to this purpose. A number of additions and changes have been made, particularly in the Appendices, which have greatly added to the utility of the work.

D. T. O.

An Introduction to English Legal History. By Harold Potter, LL.B. 2nd edition. 1926. Sweet & Maxwell, Ltd. pp. 270. 10*s.* 6*d.* net.

In the present edition this work has been extensively revised. In the comparatively small space of 270 pages the author has managed to produce an extremely useful outline of our legal history. We note, however, several obscure passages, and a few statements of not incontro-

vertible accuracy; as, for example, to say (p. 10), referring to the period between the Conquest and Edward I, that such rights as were recognised in the King's Courts became virtually the sole law in England is to ignore the extensive mass of law administered in the Church Courts, to which, indeed, the author gives ample recognition in other parts of the book, and more particularly in Appendix A.

There are also a few minor errors in Latin words, *e.g.*, on p. 33, *scaccarius* for *scaccarium*, on p. 95, *vertiter* for *vertitur*, on p. 268, (index) *recordiari* for *recordari*.

There are two useful appendices, one dealing with the influence of Civil and Canon Law in England, the other with the Law Merchant. In the future editions of the work, which undoubtedly will be called for, the addition of a third Appendix giving a brief summary of the history and jurisdiction of the Palatine Courts of Lancaster and Durham would supply a useful adjunct to what is on the whole an exteremely valuable compendium of legal historical information.

R. B. H.

Odgers on Pleading and Practice. Ninth edition. By Walter Blake Odgers. Stevens & Sons, Ltd. 1926. pp. lxxx and 542. 15*s*.

"Odgers on Pleading" has reached its ninth edition since 1891, and is now more than ever firmly established as the leading student's book on the subject. It is quite indispensable for the Bar Final Examination, and it is by no means to be despised by the practitioner. The White Book must be the first recourse of the pleader, but he will always value the experience and clarity of statement which the lamented author put at the disposal of the profession in this volume. For a masterly statement of the principles of pleading the newly called barrister will not find its equal. After reading Odgers he will also face the White Book with less trepidation. It is rarely that a single book fulfils so many functions and fulfils them so well.

The new edition contains little that is new. The work is brought up to date by Mr. Walter Blake Odgers, whose skill had already been proved in some of the revisions made during his father's lifetime; the excellence of the ninth edition is a proper tribute of filial piety.

H. E. S.

A Selection of Cases on Evidence at the Common Law. By the late James Bradley Thayer, LL.D. Revised edition by Professor J. A. Maguire. 1925. Harvard University Press (English Publisher, Oxford University Press). pp. xv and 1033. 35*s*.

This is the third edition of Thayer's classic "Cases on Evidence," of which the second edition appeared as long as 25 years ago. For the English student (who has much less time to give to the study of

evidence) the present edition, though considerably shorter than the last, would still be much too large. For the English student, indeed, a book constructed on such a plan as this would be in various respects quite unsuitable. Our system of teaching entitles him to headnotes; and he would miss the statements of principle and other introductory matter, the abridged reports, and changes of type to be found in such a book as Cockle's. We must remember, however, that Professor Maguire's work is intended for the Harvard Law School, with whose methods English lawyers are less familiar than they should be, and in whose curriculum the case-book plays a different part from the part it plays here.

Only some one-fifth of the cases are taken from English reports, and our law is not always the same as that of the various American States. We notice, for example, that at p. 305 it is said that the neglect or refusal of the accused in a criminal trial to give evidence is not permitted to create any presumption or inference against him. And there is a mass of legislation in Amercia which differs in various provisions from our own in relation to the competency of witnesses. We are of opinion therefore that the book will not be used in England by the student or practitioner of the law of England; but as a case-book on American law of evidence we recommend this very erudite work of a skilful teacher.

A. S. D.

Cases and Statutes on the Law of Evidence. By Ernest Cockle. 4th edition, by S. L. Phipson. Sweet & Maxwell, Ltd. 1925. pp. li and 567. 18*s*. 6*d*. net.

Mr. Phipson is such a recognised authority on the Law of Evidence that a better editor of the late Mr. Cockle's work could hardly have been found. "Cockle's Cases" had become in three editions the leading student's manual on this topic, and it fully deserved its popularity. Its ingenious arrangement and the thoroughness and accuracy with which the authorities were set out and handled combined to make it an outstanding model for books of this kind. It catered for, without pandering to, the needs of the examinee.

Of Mr. Phipson's edition there is little which calls for detailed comment. An important omission has been made good by the addition to the topic "Matters excluded by Privilege" of "Matters excluded by Public Policy." The book has been brought up-to-date by the occasional substitution of modern for older decisions, and by the inclusion of the legislation passed since the publication of the third edition in 1915. The excellent tradition of this useful work has been maintained to the full. In the welter of modern case books and Bar Students' texts, one is tempted to cry "O si sic omnes."

H. E. S.

Women under English Law. By MAUD I. CROFTS, M.A., LL.B. (London). The National Council of Women of Great Britain 1925. pp. xi and 101. 2*s.* 6*d.*

This is intended to be no more than an outline of the subject for the lay reader and should prove of great value to welfare workers and others who need to know the principles of the law, but might be confused by its details. Having regard to its purpose, the book rightly avoids difficulties, and there are no references to decided cases. It is logically arranged—a matter of no small difficulty in dealing with a branch of the law full of anomalies—clearly written and competently indexed. We should like to endorse the suggestion made in a foreword by Dame Millicent Fawcett, that in view of the fact that the position of women under English Law is changing rapidly, new editions should be frequently prepared.

J. A. W.

District and Parish Councils. By H. W. WIGHTWICK, B.A. 1925. Stevens & Sons, Ltd. pp. xlvi and 525. 15*s.* net.

Mr. Wightwick states in his preface that the work is "largely based on Mr. H. D. Cornish's book on District Councils." This is perhaps hardly a sufficient statement of the matter, as practically the whole of the latter book appears to be embodied verbatim. The present work in fact virtually constitutes a revised edition of Cornish, with the addition of the law relating to Parish Councils.

In form it consists of an alphabetically arranged digest; but unlike many works of this character it presents the subject matter under headings which are fairly broad and in consequence reasonably few in number. It is rarely necessary to pursue a point into more than one section of the book, and the whole text is fairly readable, so far as can be expected where the matter dealt with is of so condensed a nature. The book therefore will be of value to the student of local government to whom the sheer mass of Lumley's "Public Health" is forbidding. Where references are legion, it is a bold thing to comment on the absence of errors and misprints, but it may suffice to say that in the course of a considerable use of the book the reviewer has found none.

Mr. Cornish's book was published in 1908: the subsequent years have been fruitful in legislation, imposing upon Local Authorities a variety of additional powers and duties, notably under the various Housing and Town Planning Acts, the Land Settlement (Facilities) and Allotments Acts, and the Maternity and Child Welfare Act of 1918. The Education Act of 1921, moreover, besides consolidating the existing law and regulations, introduced important new provisions, many of which have not yet been put into effect. A subject as extensive as Education

does not readily lend itself to summarised treatment, and no attempt has been made in the present work to do more than give a summary of the main provisions. The other legislation referred to has, however, been adequately treated.

In view of the size of the book, a remarkable degree of completeness has been achieved throughout, and this involves some danger of misuse. Unless general information only is required, the work is intended to facilitate and not to supersede reference to the 250 or so different Acts quoted. In some cases, especially in the section devoted to "Expenses," a considerable body of law is summarised in a few words, and omissions are inevitable. The brief references to the exceedingly involved law of rating, for instance, are naturally enough inadequate. By way of example, it is noted that while s. 4 of the Poor Rate (Assessment and Collection) Act, 1869, is summarised, no mention is made of the alternative procedure under s. 3, which is also subject to the control of the Parish Council; and that, although the definition of "agricultural land" is briefly stated, the far more difficult question of what constitutes "land" for the purposes of the Lighting and Watching Act of 1833 is passed over without comment.

It is somewhat unfortunate that the date of publication did not permit of the inclusion of the important legislation of 1925, in particular the Rating and Valuation Act and the Public Health Act of that year, so far as they concern District and Parish Councils. Anyone making serious use of the present edition will do well to take the first opportunity of inserting cross references to these statutes in the text.

A. R. P.

Brooke's Notary. Eighth edition. By J. Cranstoun, K.C. Stevens and Sons, Ltd. 1925. pp. xviii and 504. Price 30*s.* net.

It is a little-known fact that one of the functions of the Archbishop of Canterbury, of a distinctly temporal character, is to create, through his Court of Faculties, the important class of public officials known as Notaries Public. This power is an interesting survival of the legatine authority conferred upon the Archbishop in pre-Reformation days by the Pope, and secured to him at the Reformation by a Statute of Henry VIII and a later one of Elizabeth. In Mr. Cranstoun's new edition of "Brooke's Notary" we are given a most illuminating account of the nature, origin, development, functions and powers of the notarial profession, and their connection with the Scriveners Company. The first edition was published in 1836. We have in this work an authority to which reference may be made in every branch of notarial practice. It is not merely to the public notary and to the solicitor-notary that Brooke's treatise is indispensable; but the mass of essential information which it contains ready-to-hand and in an orderly arrangement renders

it of the utmost value to the broker, merchant, shipmaster, and to the business man generally. There are 136 Forms and Precedents covering every requisite class of notarial work. Chapter X, which deals with the rules governing the execution and authentication of documents for use in the British Dominions beyond the sea, is of special value.

The Appendix contains a collection of useful information, including the Statutes controlling public notaries and the incidents of notarial practice. There is also a useful table of contents of Precedents and a good index.

R. B. H.

Apportionments and Outgoings of Land. By R. M. P. Willoughby, LL.D., Solicitor. 1925. The Solicitors' Law Stationery Society, Ltd. 7*s.* 6*d.*

One of the most important steps in a sale and purchase of land is, of course, completion, and the preparation of the statement for completion requires considerable care. Parties are anxious to have the outgoings apportioned exactly—an operation by no means as simple as it sounds—and the occasions upon which a Solicitor has either to calculate interest or apportion rates and taxes are legion. Mr. Willoughby's excellent book will be found to be a great help in these matters. Each rate or outgoing is dealt with separately and explained, both in principle and in detail, with great care, yet without an excessive burden of cases. In the Appendix are collected some specimen completion statements, illustrating the learned author's remarks on the various matters discussed.

Clearly and concisely written, we cordially recommend this book to the profession as an excellent aid to a difficult subject.

W. S. C.

The Law of Partnership. By J. Andrew Strahan, M.A., LL.B., and Norman H. Oldham, B.A., LL.B. Fourth edition, by J. A. Strahan. Sweet and Maxwell, Ltd. 1924. pp. 274. 10*s.* net.

In the present edition the text of this useful students' book has been but slightly altered by Mr. Strahan. The revision consists almost entirely of the noting-up of recent cases decided before the date of publication. That date is given on the title page as 1924. Unfortunately the preface is not dated; nor is there any indication in the book as to the month and day in 1924 up to which the revision has been brought. These exact dates are not only useful but essential in scholarship; they should be stated by editors and publishers. As in the case

of previous editions, the book is largely a commentary on the provisions of the Partnership Act, 1890. Included in the commentary are many extracts from judgments; while in the Appendix are the texts of Parliamentary Acts and Rules of the Supreme Court relative to the subject-matter of the book. Many laymen engaged in business will find it profitable to consult this little volume.

H. D. H.

Deane and Blease's Introduction to the Law of Real Property. 3rd edition, adapted to the Acts of 1925. By Prof. W. L. Blease. Sweet & Maxwell, Ltd. 1926. 12*s.* 6*d.* net.

This is a revised and extended edition of Part I. of Deane's treatise on the Law of Real Property and Conveyancing, the second edition of which appeared in 1883. The editor has adequately fulfilled the task which he set himself in producing an up-to-date and reliable preliminary survey of the Law of Real Property. The book is written in a clear and interesting style. The divisions of the subject are well proportioned and the treatment gives the student just what is necessary for the mastery of the first principles of the subject in its present phase. There are a few points which are worthy of consideration in future revisions. On p. 121, referring to the exemptions granted by section 7 of the Mortmain and Chantable Uses Act, 1888, the Universities of Oxford and Cambridge only are mentioned, omitting the three other universities included in the section; on p. 157 the words *lie* and *has* in lines 1 and 2 would be more consistent in the past tense; on p. 168 *possesson* appears for *possession;* on p. 200 *degree* for *decree;* on p. 221 *mortgaged* deed for *mortgage* deed. The last chapter, which deals with Incorporeal Hereditaments, is an addition to the previous edition. In it the concluding paragraph, referring to tithe, does not make clear the important fact that tithe arising out of the land, is, since 1891, payable by the landowner and not by the occupier.

R. B. H.

Deane and Spurling's Elements of Conveyancing. 4th edition. By W. Lyon Blease, LL.M. Sweet & Maxwell, Ltd. 1925. pp. xxiv and 386. 17*s.* 6*d.* net.

This work, with which is incorporated Clark's "Precedents in Conveyancing," has long been a useful handbook for students; and, in its present form, it will continue to serve this purpose. Mr. Blease has expended considerable labour on the present edition; he has largely

re-shaped the book and brought it up to June, 1925. The changes introduced in our law by the new legislation of 1925 have naturally affected both its form and its substance. One of the editor's chief difficulties, which he has satisfactorily surmounted, was to weave the old and the new law into the body of the book. Since titles will be affected by the old law for some time to come, Mr. Blease has very properly preserved a good deal of that law. His aim has been, however, " to save the student the trouble of studying what is merely history " (p. iii). No doubt this aim fits in with the general purpose of the book. But some history the student of conveyancing must have if he is to understand correctly the forms of precedents and the law of property, which constitutes their background; and for history the student of conveyancing must read other works. The precedents in conveyancing which are appended to the treatise (pp. 277-366) are adequate for the beginner's use. There are two main groups of forms—the ancient and the modern. As Mr. Blease remarks, conveyancers must now make " new paths " for themselves " without any of that confidence which [they] used to feel while [they] followed in the track of trustworthy pioneers." In some instances the new Acts of Parliament give some guidance, while in others the old forms serve as the basis of the new. The forms which Mr. Blease has invented will be welcomed by the student. Practitioners will also find their perusal profitable.

H. D. H.

An Outline of the Law of Agency. By A. M. Wilshere, M.A., LL.B. 1925. Sweet & Maxwell, Ltd. pp. 110.

Practising lawyers place more and more reliance on Halsbury's " Laws of England " as the happiest hunting ground for the clues to the problems before them. Mr. Wilshere wrote the article in Halsbury on Agency some fifteen years ago, and this little book consists of that article brought thoroughly up-to-date. Agency is one of the most fertile sources of litigation, and a vast number of men to-day are vitally interested in its legal aspect. Both for the interested layman and the lawyer this book should prove useful. The cost of the complete " Halsbury " is prohibitive to many; such people will welcome this opportunity of securing an up-to-date portion of it. It is well printed; it is clearly divided and subdivided; it is well stocked with references; finally and most important, the leading principles are clearly and accurately stated.

M. E. R.

A Practitioner's and Student's Digest of the Law of Bankruptcy and Deeds of Arrangement. By NEVILLE HOBSON. Third edition by the author, with accountancy notes by H. R. MATTHEWS and G. B. ROBINS. 1926. The Solicitors Law Stationery Society, Ltd. pp. 84. 4*s*.

The popularity and usefulness of this little work is proved by the fact of a third edition being called for since its first publication, two years ago. Bankruptcy and Deeds of Arrangement form a difficult topic of law, because a proper understanding of them presupposes either a knowledge of business and accountancy, or some years of experience is a somewhat watertight compartment of legal practice. A concise summary is of real service alike to students and general practitioners, and when that summary is clearly written by a solicitor and two accountants who "know their job," it successfully meets a crying need. Within its self-prescribed limits, we can confidently recommend this book. That it does not clarify the provisions of the Land Charges Act, 1925, is not entirely the fault of the present writers.

H. E. S.

The Secretary's Manual on the Law and Practice of Joint Stock Companies, with Forms and Precedents. Nineteenth edition. By T. E. HAYDON, M.A., K.C., and SIR GILBERT GARNSEY, K.B.E., F.C.A. Jordan & Sons, Ltd. 1925. pp. xxxi and 432. 7*s*. 6*d*. net.

This admirable little book is intended for the use of Company Secretaries, and its deserved popularity is proved by the fact that this is the nineteenth edition called for since 1891. Having regard to its purpose, the chapters on the Statutory Books, Commercial Books of Account and Stock Exchange Regulations are particularly full, and if the first two of these chapters were digested by every Company Secretary the work of the Winding-up Division would be considerably lightened. The chapters on winding-up and reconstruction might be expanded, but perhaps it is well that Secretaries should not be encouraged to embark on these perilous oceans without the assistance of a professionally qualified navigator. Table A is printed in full with notes—these are excellent so far as they go, but perhaps they might be increased in future editions. References to decided cases are given, but seem useless, having regard to the fact that the Reports are not usually available to Secretaries of Companies.

J. A. W.

Company Law and Practice, an Alphabetical Guide thereto. By H. W. Jordan and S. Borrie. Sixteenth edition. Jordan & Sons, Ltd. 1925. pp. xxi and 472. 8*s.* 3*d.* post free.

As a text book this guide is useless, for its alphabetical arrangement precludes anything in the nature of a logical order. It is presumably intended for the use of Secretaries and others whose business necessitates some knowledge of Company Law. That being so, it seems unnecessary to refer to decided cases, for the original reports would not be available to the average reader. All the relevant statutes and rules are printed in full—we wonder how often a lay reader will refer to these. The alphabetical arrangement necessitates, if it is to be useful, elaborate cross-references, but these appear to be inadequate. For example, the reference under " Shares " to " see under various headings " is not very helpful. The book is useful in that it sets out the practice of the Registrar of Companies and of the Commissioners of Inland Revenue, information as to which is difficult to obtain, and ignorance of which must cause many fruitless journeys to Somerset House.

J. A. W.

Solicitors: An Outline of their History. By E. B. V. Christian, LL.B., Solicitor. Stevens & Sons, Ltd. 1925. 5*s.* net.

This interesting little book, which is partly compiled from four lectures delivered by the author in 1920, forms another welcome addition to the Lawyer's Leisure Library. The first part provides an amusing insight into the early years of the profession, and the only criticism that can be offered is that the anecdotes follow so closely upon one another that the reader is apt to become confused. A certain foundation is given to the traditional attitude of the layman towards his legal adviser (so aptly depicted in the engraving in the frontispiece), and we are told that about 1290 it was found expedient to make an order enacting that attorneys should not receive a fee from both sides, nor first receive a fee and then return their briefs. In the picturesque language of the order, " And whosoever shall receive money, and shall fail unto his client, shall return double, and shall not be heard against him in such Plea " . . . .

The penalty for suing in the wrong Court in early days was indeed a severe one, and a Londoner who tried to sue in another town was " deprived of his franchise, committed as a foreigner to Newgate and not allowed to keep open shop in the City."

While the lot of the articled clerk in the early days of the last century was a hard one so far as acquiring a knowledge of the law was concerned (for he had but few text books or lectures to assist him), he had the pull over his present-day brethren in regard to the examinations he was required to pass. A few words with a Judge, according to Mr.

Christian, and the deed was done. The consequence was a lowering in the standard of legal knowledge, and we are told the story of a candidate for admission, who, on entering the room shook hands with his examiner, and was greeted : " Good morning, Mr. So & So, I hope you will be as great an ornament to the profession as your father, you have passed your examination."

Altogether an amusing and interesting book.

W. S. C.

A Sketch of the History of India, 1858-1918. By H. Dodwell. Longmans, Green. 1925. pp. xi and 326. 6*s*.

Professor Dodwell has chosen a complex period, and he very rightly does not underestimate the difficulties of his task. On the one hand, he has remarked the immense influence on Indian economic, moral and political conditions which has been brought to bear by the shrinkage of the world with the development of communications; on the other hand, he realises how comparatively impervious to any single influence is the great mass of Indian thought or the apathetic conservatism of the millions. Professor Dodwell has steered a very fair course between the Scylla of optimism and the Charybdis of pessimism in his review of all these factors.

There appear to the author to have been three considerable errors in British policy as a whole during the last two generations. In the first place the Home Government has over-asserted itself, and the increased centralisation involved has begotten uniformity. The result cannot be an adequate instrument for the Government of a distant population composed of amazingly different elements. Secondly, the Indian Government seems to have over-valued efficiency of administration, at the expense of the political education of the governed. And thirdly, policy has been unnecessarily inconsistent. There was a lack of continuity in the successive aims and experiments of Canning, Lytton, Ripon and Minto. The last criticism is just, but the phenomenon which it censures is so general that it needs no apology.

The book has the rare quality of presenting history as a story of fascinating interest. The evidence is well marshalled and the narration of events is relieved by character sketches of the protagonists. Especially illuminating is the contrast between Mr. Morley and Lord Minto at p. 277.

The index is not entirely accurate : Sir Bartle Frere sometimes appears in the text where he is not noted in the index and *vice versa*.

E. B. W.

We have also received *Vol. I.* of *Wolstenholme and Cherry's Conveyancing Statutes*, 11th edition, by SIR B. CHERRY, J. CHADWICK and J. R. P. MAXWELL, Stevens & Sons, Ltd., 1925, £2 net per volume; and *Vols. I. and II.* of *Prideaux's Forms and Precedents in Conveyancing*, 22nd edition, by SIR B. CHERRY and J. R. P. MAXWELL, Stevens & Sons, Ltd., and the Solicitors' Law Stationery Society, Ltd., 1926, £2 2*s.* net. per volume. We shall review these works when their publication is complete.

We beg to acknowledge, pending review, the receipt of *Harris' Hints on Advocacy*, 16th edition, Stevens & Sons, Ltd., 1926, 10*s.* net; *Gore-Browne's Handbook on Joint-Stock Companies*, 36th edition, by T. E. HAYDON, K.C., and H. W. JORDAN, Jordan & Sons, Ltd., 1925, 17*s.* 6*d.* net; *Superstition or Relationality in Action for Peace*, by A. V. LUNDSTEDT, LL.D., Longmans, Green & Co., 1925, 12*s.* 6*d.* net; *Kenny on Criminal Law*, 12th edition revised, Cambridge University Press, 1926, 15*s.* net; *Poor Law Settlement and Removal*, 3rd edition, by H. DAVEY, Stevens & Sons, Ltd., 1925, 15*s.* net; *Principles of the General Law of Mortgages*, 3rd edition, by J. A. STRAHAN, M.A., LL.B., Sweet & Maxwell, Ltd., 1925, 12*s.* 6*d.* net; *Elements of the Law of Contract*, 6th edition, by A. P. CARTER, K.C., Sweet & Maxwell, Ltd., 1925, 12*s.* 6*d.*; *Modern Investigation of Title*, by T. GOSSET, Stevens & Sons, Ltd., 1926, 10*s.* net.; *The Law of Friendly Societies*, by F. B. FULLER, 4th edition, Stevens & Sons, Ltd., 1926, 30*s.* net; *Powers of and Applications to the Court under the New Property Acts*, by E. RIVIERE, Stevens & Sons, Ltd., 1926, 6*s.* net.